EQUITY CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH-CAROLINA.

DECEMBER TERM, 1830.

Trustees of the Organ Meeting House
v.
William Seaford et al.
} From Rowan.

A Court of Equity will not, upon a dispute respecting the title to church property, decide a religious controversy between its members.

The bill charged, that in 1786, one *Lutric Seffret* executed a deed of conveyance, for a valuable consideration, "to the elders and trustees, and their successors in office, of the Lutheran Congregation belonging to the second Creek Organ Meeting-House," for a tract of land on which a meeting-house was afterwards erected: That under the said conveyance, the predecessors of the Plaintiffs had entered and enjoyed peaceable and uninterrupted possession of the premises, for the purpose of divine worship, according to the Lutheran form, until the year 1820, when a part of the members composing the Lutheran Church adopted a general synod, a form of church government previously unknown to the Lutheran Church —that the Defendants, in the year 1820, were elected elders, deacons and trustees of the Organ Church, in the belief that they would faithfully adhere to the form of

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church government established by their ancestors—that in violation of the trust reposed in them, the Defendants had sent delegates to the general synod, and had excluded from the meeting-house several clergymen regularly ordained according to the Lutheran form, and also the Plaintiffs and those by whom they were appointed, all of whom adhered to the old form of church government—that in 1826, the Plaintiffs were duly elected and ordained as trustees, elders and deacons, by a constitutional number of those adhering to the primitive church. The prayer for relief was general.

A copy of the deed was filed as an exhibit. It conveyed the land in dispute for the consideration of £5, to "the trustees and elders, and their successors in office, for the Lutheran Congregation, belonging to the second Creek Organ Meeting-House," but was absolute upon its face, not specifying any particular purpose, to which the premises were to be appropriated.

The answer denied, that the Plaintiffs had been duly elected elders and trustees of the Organ Church congregation; and alleged, that at the time of this pretended election, the Defendants were acting trustees and elders of the church, and that the Plaintiffs, and those whom they represented, constituted a very small minority of the members. These allegations were fully supported by the testimony.

Nash, for the Plaintiffs.

Gaston, for the Defendants.

Hall, Judge.—It appears that the Organ Meeting-House was erected by its members: that the land on which it stands was conveyed to its trustees and elders by the grantor, for the consideration of £5. Whether that sum was the full value of the land does not appear. Nor does it appear, that the grantor belonged to that church, or professed the same tenets, which they held.—

There was no condition annexed to the grant, the observance of no rules of faith, nor church discipline, nor any rules for the government of the church prescribed or enjoined. It was simply a conveyance of the land for a valuable consideration. And as long as the church exists, particularly since the passage of the act of 1796 (*Rev. c.* 457,) the church will hold the land. Whether the grantor would have any claim to it, in case the church were to become Mahometan or Pagan, or profess their belief in the heathen mythology, I am not now, nor shall I ever be called upon to give an opinion. I am also spared from giving any opinion, provided they worship Almighty God according to the dictates of their own conscience. *(See the 19th section of the bill of rights.)* But I am free to give the opinion, that as long as their religious tenets and devotions are confined to the sphere of Christianity, the grantor can have no claim; whether the conveyance shall be considered to be made upon a valuable consideration, or whether it shall be considered to be a donation. If the grantor has no right, on what foundation does the Plaintiff's claim rest? It appears, that they are seceders from the church, and are not the trustees or representatives of it; that they were a minority of the members before their secession. Had they remained in the church, they must have yielded to the government of the majority. Much less can they have any control over it, when they are no part of it. It is a rule applicable to aggregate corporations or to societies, that the will of the majority must govern. A contrary rule would be as absurd, as to say, that a lesser number contained more units than a greater.

With respect to the allegation made by the Plaintiffs, that the Defendants, or the church which they represent, have strayed from the true faith, or that errors have crept into the church government, the answer is, that on that question, it is not for them, nor this Court to decide. It might be more than difficult to qualify any

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earthly tribunal to decide it. As the Plaintiffs are not members of the church, they cannot claim to control it, more than any other persons who are not connected with it.

PER CURIAM.—Bill dismissed with costs.

Barden Tolar
v.
Nehemiah Tolar, } From Wayne.

If a voluntary deed, fairly obtained, is destroyed by the donor before registration, a Court of Equity will compel him to convey the same property to the donee.

The Plaintiff alleged, that his father, the Defendant, being willing to advance him in life, as well as to repay him for services rendered, in February, 1821, conveyed to him in fee-simple 100 acres of land, and also six slaves—that the deed was delivered by the Defendant to the Plaintiff, and was by the latter deposited for safe-keeping with one *Hopton Coor*—that the Defendant afterwards, by some contrivance, got possession of it, and destroyed it.

The prayer was, that the Defendant might be compelled to execute to the Plaintiff another deed for the same property.

The Defendant denied every allegation of the bill, as to the execution of the deed, and averred, that he was very illiterate, and also old and infirm—that he had once executed a will, which he supposed was the paper mentioned by the Plaintiff, by which he divided all his property equally among all his children, and insisted that to be the only instrument he had ever executed disposing of his property; and that if it was not a will, it had been falsely read to him. This he admitted had been destroyed.

Upon replication, many depositions were taken—a statement of which will be found in the opinion of his Honor Judge HALL.

Mordecai, with whom was *Devereux*, for the Plaintiff, cited *Dawson* v. *Dawson* (*ante* 93) *Souverbye* v. *Arden* (1 *John. Ch. Rep.* 240) *Doe ex dem. of Garnons* v. *Knight* (12 *Ser. & Low.* 351) *Worrall* v. *Jacob* (3 *Mer.* 256).

Gaston, for the Defendant.

HALL, Judge.—The Plaintiff does not call upon the Court for its assistance to supply any defect, or rectify a mistake in the voluntary deed of gift, which is the subject of the present dispute, but to restore him to the evidence of a legal title—the deed of gift of which he has been deprived (as is admitted in the answer) by the Defendant's own conduct.

It appears, that the Defendant was an old man, and that his mind laboured under the infirmities incident to old age. But none of the numerous witnesses examined in the case, say, that he was incapable of transacting his business, or of making a contract.

It is clear, that the deed of gift was not executed with precipitancy, but with some deliberation. *Arthur Jones* states, in his deposition, that he saw the Defendant at his father's, and he told him he was on his way to *Hopton Coor's*, to get him to write a deed of gift, and that he intended to give all his property to *Barden*, the Plaintiff. He says further, that he and the family remonstrated with the Plaintiff against the impropriety of giving all to one child. He persisted in his determination to do so, and said, if *Hopton Coor* would not write it for him, he would get some other person to do it. He would not return until he had accomplished it. This happened two or three days before the delivery of the deed of gift. *Calvin Coor* says, in his deposition, that the Defendant went to the house of *Hopton Coor*, about the 20th of Fe-

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bruary, 1821; that he appeared to be in his senses; that he wrote a deed of gift for him; that he signed it, and that he and *Hopton Coor* attested it as witnesses; that by the deed of gift, he conveyed all the land that he had in possession, and six negroes, by the names of *Dorcas*, *Hardy*, *Britton*, *Zeny* and *Jonas*; that the name of the other negro he does not recollect; that the deed was read over to the Defendant; that he expressed his satisfaction with it; that it was delivered to *Barden Tolar*, the Plaintiff; that he told the Plaintiff to go and have it recorded; but that in consequence of something *Hopton Coor* said, the Defendant observed, it would be time enough to have it recorded after his death, and told Plaintiff to let *Hopton Coor* keep it, upon which the Plaintiff delivered it to *Hopton Coor*. In the most important facts stated by this witness, he is supported and corroborated by the testimony of *Dorcas Coor*. *Arthur Jones* states, that in a short time afterwards, he saw the Defendant, and was told by him that he had executed the deed of gift, and that it was left with *Hopton Coor*.

At this stage of the inquiry, it may be assumed, that title to the property contained in the deed of gift became vested in the Plaintiff. For although it had been placed in the possession of *Hopton Coor*, it had been previously delivered to the Plaintiff, and his placing it there was his own act. The title to the property had previously passed to him. That act was not obligatory upon him. He might have had it recorded when he pleased. Several depositions have been read to prove, that the Defendant, on several occasions, declared that he had conveyed all his property to the Plaintiff, excepting perhaps his hogs, chickens, &c. and that he had no right to exercise acts of ownership over it. Other depositions have been read, to prove that he did, on various occasions, exercise acts of ownership over it, and treated it as his own. These circumstances relative to the management of the estate, prove nothing on either side. It was natural, when fa-

ther and son lived together, that each of them should occasionally use the property, and treat it as if it was his own.

It does not appear, that after the Defendant had regained possession of the deed of gift, and destroyed it, which was a few days after he executed it, that the possession of the property was in any respect changed, until the Plaintiff left his father's, and went to live by himself. Until then, the possession accompanied the title, whether it was in the father or in the son. After their separation, it does not appear that the father had such an adverse possession of either the land or negroes, as would give him a title under the statute of limitations.

Depositions have been read to prove, that the Plaintiff himself did not consider that he had a right to the land or negroes. Some of the depositions say, that the Plaintiff was an ignorant man. Perhaps he might have thought, that his title was divested by the destruction of the deed of gift. If such was the case, his misconception of his rights should not injure him. It is admitted by the Defendant, in his answer, that some days after the execution of the deed of gift by him, he went to *Hopton Coor's* house and applied for it; that *Dorcas Coor* delivered it to him, and he destroyed it.

From an examination of the whole case, I am of opinion, that the Defendant be decreed to convey to the Plaintiff, all the land that he was possessed of at the date of the deed of gift; and that the Master ascertain the identity of it: That he also convey to him the six negroes, with their increase since the date of the deed of gift: That he ascertain the name of the sixth negro, not recollected by *Calvin Coor*; and that this conveyance be made by such a deed as the Master shall approve, without warranty.

PER CURIAM.—Decree accordingly.

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William Thompson et al.
v.
Elisha Applewhite.
} From Wayne.

A Plaintiff who claims under a will, which is not admitted in the answer, must produce it, or a copy of it at the hearing, or account for its loss.

One who claims under a will which is not established, must have all the persons interested to contest it before the Court.

The bill charged, that the Defendant, in the year 1807, made an entry with the entry-taker of Wayne county; that before a grant issued thereon, he agreed to convey the land thus entered to his father *John Applewhite*, and executed a bond, by which he bound himself to have the entry surveyed, and after obtaining a grant, to convey it to his father; that the Defendant had perfected his title to the land, but in consequence of the father's death, the Defendant never had conveyed the land according to his agreement. That *John Applewhite* by his will devised the land above mentioned to his son *Isaac*, who was also dead, leaving the Plaintiffs his heirs at law; and that the Defendant had refused to convey the land either to *Isaac* or the Plaintiffs. The prayer was for a conveyance to the Plaintiffs.

The Defendant admitted the entry as charged in the bill, and that a grant had issued to him; but denied the execution of the bond to his father, as alleged in the bill. He admitted, that long after the issuing of the grant, his father being then very old and on his death bed, *Isaac* the ancestor of the Plaintiffs proposed to him, the Defendant, that as the land had always been occupied by their father, and was supposed to have formed a part of his home plantation, that the Defendant should execute a bond to make their father a title thereto; that for the sake of preserving the peace of the family, the Defendant did then execute a bond to his father, with a condition to make a title, not to his father, but to his bro-

ther *Isaac*. But he averred, that no other consideration passed to him, upon executing this bond; and shortly thereafter it was by the father, with the consent of *Isaac*, cancelled. The Defendant admitted the devise of his father to *Isaac* of the home plantation, but denied that the land in dispute formed any part thereof, or that it would have passed by the will, supposing the father to have had title thereto. He averred, that *John*, the father, left two other children besides the Plaintiff and himself, and contended, that if the father had title thereto, the Plaintiffs were entitled to only one fourth thereof, as it did not pass under the will of the father.

A replication was taken to the answer, and several witnesses were examined, whose depositions were read at the hearing. But there was no copy of the will of *John*, the father, filed as an exhibit; it was said to have been lost after probate, but before it was recorded—but there was no proof of this fact.

Mordecai, with whom was *Devereux*, for the Plaintiff.

Gaston, for the Defendant.

HENDERSON, Chief-Justice.—Proof of the devise to *Isaac* is indispensable, to support this bill. If the fact be, as charged in the bill, that the condition of the bond was to make title to the father, most certainly he who claims as his devisee, must show a devise. If it be, as insisted on in the answer, that the condition was to make title to *Isaac*, the circumstances attending its execution prove most clearly, that such condition was introduced as ancillary to the will. So far therefore the condition was testamentary, and fell to the ground, either by revocation of the will, or if the will was not executed to pass real estate, or by any other cause which rendered the will inoperative. But the weight of evidence is in favor of the case made in the bill. Neither the will, nor a copy is offered in evidence; but the answer ad-

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mits a devise to *Isaac* of the home plantation, but denies that the lands in question are embraced by that description, and there is no evidence to prove that they are. The deposition of one witness, taken evidently to another point, renders it somewhat probable that they are a part of, or adjoin the home plantation. But it by no means proves it satisfactorily. The depositions of the other witnesses state, that by the will the lands were devised to *Isaac*. This is giving parol evidence of the contents of a paper without proving its loss, or that it is beyond the reach of the party offering it. And besides, they do not state the words or substance of the devise.—The bill must therefore be dismissed, for want of proof of the fact of the devise.

The bill is objectionable for want of parties, the heirs of the father; as they are interested in contesting the devise. For if not devised, the lands descend to all the heirs. The bill is silent, who are the heirs, and therefore does not make a case proper for a decree. But the answer states expressly, that there are two other heirs, not before the Court. If the case made had been supported by the evidence, this defect might have been aided by an amendment. But we cannot get over the defect in the proof.

Per Curiam.—Let the bill be dismissed with costs, but without prejudice.

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John Huson et al.
v.
Joseph McKenzie et al. } From Lincoln.

A creditor of an executor, who has taken a security for his debt upon the assets of the testator with notice, cannot hold them against the legatees.

A single act of mal-administration cannot be made the foundation of a suit against an executor; but the whole administration must be inquired into, and if the frame of the bill does not permit this, it must be dismissed.

A bill brought by some of the persons entitled under a residuary clause in a will, without making the others Defendants, or accounting for the omission, cannot be supported.

The bill was filed by three of the infant children of *William Huson*. It stated, that their father, by his will, devised as follows: "I will that my wife, *Mary Huson*, "shall have such part of my land, as she, with her chil- "dren and negroes which are left to her, can attend un- "der crop annually, during her natural life or widow- "hood, and the balance of cleared land I will that it be "rented out annually by my executors, until my children "come of age to take it into their own possession. As "to my negro woman *Tempe*, and my two negro boys, "*Stephen* and *Leo*, my will is, that these negroes be hired "out annually, and the monies arising from their hire, "be appropriated to schooling my children, or as much "of it as may be necessary to give them a good English "education, and the balance of the said hire (if there be "any) shall be reserved to meet accidental occurrences "(the death of slaves specifically bequeathed) if these "should happen; if no such occurrence should arise to "call for a particular distribution of the above monies, "then, and in that case, my will is, that it be equally "divided among all my children—and I will that these "negroes directed to be hired out, be hired until my "youngest child comes of age; after this, they shall be "equally divided among all my children." That all

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the executors, except *Mary Huson*, the mother of the Plaintiffs, refused to qualify, and that she alone proved the will—that she wasted the estate, and married one *Friddle*, who was made a Defendant—that *Friddle* executed a lease to *McKenzie* for the land, and also hired to him the two male slaves mentioned in the will, as a security for a debt—that this lease and hiring were in fraud of the trust reposed by the testator in his executrix, the wife of *Friddle*, and that the Plaintiffs did not receive from the rents of the land and the hire of the negroes, that education which their father designed they should have, as it was entirely consumed in paying *Friddle's* debt to *McKenzie*. The prayer was, that the land and slaves might be surrendered by *McKenzie*, and rented and hired by the Master, for the purpose of educating the Plaintiffs.

The will of *Mason Huson* was filed as an exhibit, and it appeared from it, that he left six children, and his wife *enceint* with another, to five of whom, and the one unborn, he had bequeathed the residue of his estate, as a daughter, *Elizabeth*, had been provided for by her grandfather.

The Defendant, *McKenzie*, who alone answered, admitted the conveyance by *Friddle*, as charged in the bill, but insisted that he was not accountable for a waste of the assets committed by *Friddle* or his wife.

The case was submitted by *Gaston*, for the Plaintiffs.

No Counsel appeared for the Defendants.

RUFFIN, Judge.—The bill is filed for the purpose of setting aside a conveyance, made by *Friddle* and wife, to the other Defendant, on the ground, that the executors fraudulently conveyed, in payment of a private debt, the estate of their testator, which they held by the express terms of the will, in trust for the children of the testator. The Court has looked into the will, and the answer of *McKenzie*; and it thence appears plainly enough, that

the deed cannot stand, unless upon the general accounts of the estate, debts of the testator, or a balance due the executrix, shall be found to justify such a disposition of the property as has been made. Upon the merits, as now indicated, there would be no hesitation in decreeing the relief prayed. But the bill itself is so fatally defective, that nothing can be made of it. The will carries the rent of the lands, and the negroes, and their hires and issues, first to the education of the children, and then into the general residue of the estate, after making up such losses as might occur in the legacies by the death of the slaves, specifically bequeathed; and the will shows five children, besides *Elizabeth* (who is excluded from the residue) and the unborn child of which the testator thought, that his wife might be *encint*. The bill is brought by only three of the children, without making any of the others parties, or assigning a reason for the omission: and it prays simply, that this conveyance may be declared void, and the estates conveyed to some other trustee.

It is impossible, that isolated acts in the course of an administration can be made the subjects of a suit. Their merits cannot be determined, without going into the whole estate, and there is nothing in the pleadings to cover such an extended inquiry. The Court cannot permit litigation to be multiplied by splitting up a mal-administration into all its particulars, and making each the subject of a suit. The whole forms but one trust and subject of litigation. Parties, under such a practice as is attempted, would be ruined by costs, and the Court harassed continually by repeated investigations of the same matter. Besides, all the parties in interest must be before the Court. How can we declare the conveyance void, and deprive the executors of the trust, and appoint another trustee, without knowing the wishes of the other legatees? If indeed a formal party alone were waiting, the Court might overlook it, or send the case back, to have the defect supplied. But here the cause is brought to a hear-

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ing, upon a bill so entirely founded on a misconception, and defectively framed, that it is incapable of amendment, without making a new case altogether.

PER CURIAM.—Decree, that because it appears from the will of *Mason Huson* in the pleadings mentioned, that there are besides the Plaintiffs other residuary legatees, who by said will are entitled to shares in the testator's estate, and particularly in the portions of it in controversy in this cause, and they are not made parties to the suit, nor any reason assigned for the omission; and because no general account of the testator's estate is sought in the bill, or can be taken under it, the bill is dismissed with costs. But declare, that this decree is without prejudice to any proper bill to be brought by the Plaintiffs for such general accounts, including the subject matter of the present bill.

Alvia Spear
v.
Bezaleel Gillet,
} From Wake.

Where, upon a contract by copartners, made in Virginia, the bond of one was taken to secure the partnership debt, it was *held*, that if by the law of that State the contract be joint, the execution of the bond extinguished the debt; if joint and several, that it was no merger of the simple contract debt against the other partners; and as the creditor had a plain remedy against them at Law, a Court of Equity could not aid him, further than by a discovery; and this, although he averred, that the bond was executed in the copartnership name by one copartner, in ignorance on his part, that it did not bind the copartnership.

The case made by the bill was, that the Plaintiff, a resident of Virginia, in the year 1819, sold to a copartnership, which he then thought consisted of *Leonard Merriman*, *John Merriman*, and *David Gillet*, a quantity of goods—that being ignorant of the rule of law, that one

partner could not bind the copartnership by deed, he took from *Leonard Merriman*, who made the purchase, an instrument signed and sealed in the copartnership name; that being advised that the other partners were not bound by the bond executed by *Leonard Merriman*, the Plaintiff commenced an action against him alone, and had, upon final process, imprisoned him; but being entirely insolvent, he had been discharged under the insolvent laws. That since the discharge of *Merriman*, the Plaintiff had discovered that the Defendant was also a member of the copartnership of *Merriman & Gillet*.

The bill prayed for a discovery, and that the Defendant might be decreed to pay the Plaintiff the amount of the bond executed by *Leonard Merriman*.

An answer was filed, and proof taken; but a summary of them is unnecessary.

W. H. Haywood, for the Plaintiff.

Gaston & Devereux, for the Defendant.

RUFFIN, Judge.—A very evasive answer, in this case, raises a strong suspicion in my mind that the Defendant was a partner, which is fully confirmed by the proofs. I should therefore be pleased, if I could, to make him liable to a debt which he justly owes; and especially since the nature of his defence here has held up the case, until it is too late to sue at Law. But I believe there is no ground for this Court to relieve on, and the bill must be dismissed.

If the contract is to be regarded as joint and several, or although made in Virginia, if it can be enforced here, under our statute, by a joint or several suit, the bond of *Merriman* did not extinguish it, as to any body but himself. That is common doctrine; and is exemplified every day in suits being brought against one joint and several obligor, after a judgment against another. The remedy at Law by *assumpsit* remained against the other

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partners, after *Merriman* had given his bond. It is not like a release, which supposes or imports a satisfaction. It is simply an extinguishment of the simple contract, as far as regards *Merriman* and no farther.

If on the other hand, the contract of partners is by the Law of Virginia joint, and not joint and several, then it is extinguished altogether by taking the bond of one of them; because it is as to the obligor himself, and the others cannot be sued without him. If the others are sued separately, they may plead it in abatement. If they are all sued jointly, then the bond is a bar. It is like the case of a judgment against one of two joint obligors; after which the security cannot be further proceeded on, and is lost. (*Brown* v. *Wooten*, *Cro. Jac.* 73). Is there any thing to induce Equity to interpose? The party has himself extinguished his legal remedy for a mere legal demand. The mere loss of a debt does not raise an equity. Negligence or mere ignorance does not call into action this jurisdiction. That is the party's fault. There must be some accident, fraud or mistake. When he took the bond of one partner, it is proved that he trusted that one. He cannot say that he is entitled to a better security now, because he might have had it at first, if he had chosen. He made his selection, and must abide by it. In the present case, the bill admits that the Defendant was not trusted; for the Plaintiff did not know him as a partner, and never discovered that he was until after judgment against the other. His own folly in trusting a man unworthy of it, or in omitting to ascertain whom he had bound for the price of the goods before he took a security, by which a part, then legally bound, became discharged, cannot be helped. If this had been a subsequent arrangement, upon any representation that there were no other partners at the buying of the goods; or if it were shown, that the goods were bought under an agreement to conceal the partners, and with a view to

Merriman's insolvency, the matter would be different. That would be a fraud. But here, the scope of the bill is to get a security, which the Plaintiff admits he did not contract for, upon the ground that at Law he had it without his knowledge, and without his knowledge has lost it. There is no such head of Equity, that I know of. This is not like following the assets of a deceased partner, upon the insolvency of the survivor. That goes upon the idea, that both were trusted, and each looked to, and the accident of the death of one shall not defeat the creditor. But that idea is completely rebutted, when a several security is originally taken from one of the partners. I repeat, that the whole ground of the bill is, that the Plaintiff, in willful darkness, made a bad bargain in the exchange of securities. When he gave up his remedy at Law by his own act, he gave up that in Equity—there being no fraud.

HENDERSON, Chief Justice.—The Plaintiff has come into this Court, upon a clear case for an action of *assumpsit* at Law, for goods sold to a firm of which he alleges the Defendant was a partner. If indeed he had alleged, that he could not prove the fact of a partnership, and asked for a discovery to aid him at Law, this Court would have granted him the aid required; but cannot, where there is a *clear* legal remedy, give relief. The giving of the bond by one copartner certainly does not extinguish the simple contract debt, as to the other; for merger, which is an operation of the law, never works an injury. The bond could not merge the simple contract, but as to those who were *bound* by it; *as to them a written evidence and higher remedy* are given. If therefore a person gives a bond for his own simple contract debt, the simple contract debt is merged; but not so, if he gives a bond for his own bond debt. The latter may possibly be given *in satisfaction* of the former; but there is no merger. So, if one gives a bond for the simple

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contract debt of another, the simple contract debt is not merged, and may be enforced. If a creditor sues one of two obligors or promissors, and obtains judgment, the original suit as to the other remains, and is not merged in the *judgment*; and may be sued on as if no judgment had been obtained. This is every day's practice and experience.

PER CURIAM.—Let the bill be dismissed with costs.

William Davidson
v.
Thomas L. Cowan,
} From Mecklenburg.

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A judgment creditor is not affected by notice of a prior unregistered mortgage, and is, in this respect, distinguished from the vendee of the mortgagor himself. Therefore, the Court will not enjoin such creditor from selling the mortgaged premises, under his execution.

The facts stated in the bill and answer were the same, as those reported in the cause at Law between the same parties (2 *vol. Law Cases, p.* 538). The bill prayed an injunction against an execution, issuing on that judgment, upon the ground, that at the time the Defendant recovered his judgment, as well as when the negroes of *McCulloch*, mortgaged to the Plaintiff, were seized under the first execution, the Defendant had notice of the mortgage, although it was not then registered.

Gaston, for the Plaintiff.

Nash, with whom was *Badger*, for the Defendant.

RUFFIN, Judge.—This cause might well be decided upon its particular circumstances; since the agreement of the parties, mentioned in the pleadings, would conclude them, and the judgment at Law is upon that agreement.

But it may be serviceable to the profession and the community generally, for the Court at once to declare the law upon the general question made; as the whole Court has a clear opinion on it.

That question is, whether a notice of an unregistered mortgage or deed of trust, acquired by a creditor by judgment of the mortgagor, before a sale on his execution, affects the creditor, and sets up the deed. And we think not. There is no equity against a creditor, restraining him from using all legal means to obtain a preference, and ultimate satisfaction of his debt. The period of contracting the debt is wholly immaterial. One creditor may justly obtain satisfaction, although he knows that he thereby deprives his debtor of the means of paying a debt previously contracted. Nothing but the actual divesting of the debtor's estate, or a specific valid *lien* on it at Law, can defeat a creditor. If he obtains his execution before an elder debt is ripened into judgment, he may satisfy himself. If he gets the legal preference by his execution, before a creditor by a mortgage perfects his title by registration, he may likewise satisfy himself. Each has an equal equity, and one has the law. He may keep it. The case of a purchaser is entirely different. He has no equity, if he buys what he knows another cannot rightfully sell. He claims under the mortgagor, by a contract made in fraud of another. He is not obliged to lay out his money, and does it at a risk. A creditor claims against both mortgagor and mortgagee, and is seeking, not to deprive another of his rights, but to save himself. In such a storm, he who can lay hold of a plank, by getting the advantage at Law, shall not be deprived of it. As against a creditor, the deed is not valid until registration; and if it be not registered before the *teste* of the creditor's execution, it does not stand in his way.

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PER CURIAM.—Let the bill be dismissed with costs.

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Duke Scales, adm'r of Abner Walker et al. } From Rockingham.

An agreement by parol, made before the act of 1819 (*Rev. c.* 1016) by a father, in consideration of the marriage of his illegitimate daughter, to settle all his estate upon her husband, herself, and the issue of her marriage, is binding; and although it does not attach specifically upon any portion of the father's property, so as to defeat a purchaser with notice, yet it will be enforced against volunteers claiming under him. For though the relation between the father and the illegitimate daughter is not a sufficient consideration to raise a use, yet the intervention of the husband extends to the wife and the issue.

In executing such an agreement, care will be taken of the interest of the issue—and the husband submitting, the estate was limited to him for life, with a power to make advancements upon the marriage or full age of the children; with remainder to the issue, as tenants in common, and cross remainders between them, upon their death under age and unmarried.

The Plaintiffs alleged, that the intestate, *Walker*, had an illegitimate daughter, called *Elizabeth Covington*, to whom he was much attached, and who had been reared by him in his own house—that when the daughter attained a proper age, *Walker* was very desirous to see her respectably married—that the Plaintiff, *Wall*, being in every respect a suitable match, paid his addresses to the daughter, and was informed by *Walker*, that in the event of the marriage, he, *Walker*, would, at his death, give the Plaintiff, *Wall*, all his estate—that in pursuance of the agreement thus made, a marriage was solemnized between the Plaintiff, *Wall*, and *Elizabeth Covington*, the daughter—that she was dead, leaving the other Plaintiffs, the issue of the marriage—that *Walker* had died, without lawful issue, and without making any settlement of his estate pursuant to his agreement with *Wall*, and that administration upon his estate had been committed to the Defendant, *Scales*—that he was seised of a valua-

ble real estate, which had descended to the other Defendants, his heirs at law.

The Plaintiffs prayed an account of the real and personal estate of *Abner Wall*, and that it might be settled in pursuance of the agreement set forth in the bill; the Plaintiff, *Wall*, submitting to any apportionment of it between him and the other Plaintiffs, which might be directed.

The Defendants did not admit, nor positively deny the agreement set forth in the bill; but held the Plaintiffs to proof thereof.

Many depositions were read at the hearing, which will be found stated in the opinion of his Honor Judge RUFFIN.

Gaston, for the Plaintiffs.

Nash, *contra*.

RUFFIN, Judge.—The bill is filed to obtain the specific execution of a contract between the intestate and the Plaintiff, *William M. Wall*, upon his marriage with *Elizabeth*, a natural daughter of *Walker*. It is alleged in the bill, that *Walker* agreed, with a view to the marriage, and in consideration of it, to give all his estate, upon his death, to *Wall* and his wife.

The bill charges, that *Elizabeth* was *Walker's* daughter, and that he was unmarried, and had no other issue; that he acknowledged her; took her from her mother in tender infancy, and received her into his own house; where, being a man of good estate, he bred her up genteelly; that when she grew up, he frequently expressed his wish, that she should marry respectably, and declared, that if she married to please him, he would settle all his property on her at his death. It further charges, that the Plaintiff addressed her for a considerable time with the knowledge and approbation of her father, and married her with his free consent.

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A question might arise on the case thus stated—which is fully supported by the proofs taken on both sides—whether a man who holds out a natural daughter to the world, as the future successor to his estate, for the sake of advancing her in society, and marrying her respectably; who encourages the addresses of a young man of good property and standing, without coming to some specific understanding with him, that those expectations naturally arising from his conduct, must be still regarded as dependent upon his good will and bounty; can be allowed afterwards to treat such declarations as mere expressions of affection, and not binding on him. The case of the young people is much stronger in this point of view, than if the daughter were legitimate. Then such general declarations might be referred to the succession by law, which would render unnecessary any act of the parent. But all the parties here knew, that some act was indispensable, and that there was no possibility of the estate going, as contemplated, without a settlement or contract of some sort. It is to be expected that, upon marriage, every person of either sex has a care for some provision for the family. They ought to do so. In ordinary instances, this may be deemed sufficiently secured by the natural affection of the parent, and the descents and distributions by law in cases of intestacy. But where an illegitimate is concerned, nothing but a contract is any guarantee. This raises a strong presumption, that such declarations were intended to procure an advantageous match; that they did raise expectations, as designed; and that the marriage took place on the faith of them. It would be a material inquiry, whether the father should be allowed absolutely to disappoint them. Would it not be a fraud on the marrying parties, and through them on the issue? To avoid that, would not the Court be obliged to hold such dealing a contract? But the case does not depend upon implying a contract; as there is full evidence that one was expressly made a short time before the marriage.

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It is to be remarked, that the transaction occurred in 1816, and of course before our act, requiring all contracts for the sale of land and slaves to be in writing. Happily no such controversies can now arise, where the fact of the contract and its terms will not more explicitly appear, than by uncertain and contradictory parol testimony.

But in few instances could parol testimony be more consistent and satisfactory, than in the present. Almost every one of the numerous witnesses in the cause proves, that *Wall* had visited the young woman at her father's, and had been engaged to her for a considerable time. This was not only known to *Walker*, from his own observation; but *Wall* had mentioned it to him, and obtained his consent. The marriage did not immediatel take place; and unfortunately, the parties became too intimate, and the daughter became pregnant.

John Scales, who married a niece of *Walker* and lived within half a mile of him, says, that the marriage took place on Thursday, and that on the Sunday before he was at *Walker's*, when the latter first discovered his daughter's situation. *Wall* was immediately sent for, and came. *Walker* seized his gun, and swore he would kill him; to which the other replied, "*fire away—I am not afraid of your gun; but I am not to be forced into measures.*" The gun being taken away, *Walker's* passion subsided. He wept, and calling for his daughter, sat down and took her on his knee, and made *Wall* sit beside them. He then said, "you have ruined my happiness. Did I not tell you, *when you spoke to me for my daughter*, that I had willed her all my estate. Will you destroy my hopes, and not marry her now? *And I now promise you, if you will marry Betsey, I will give you all my estate at my death.* You may come and live with me, and make all you can; all I want is my support while I live." *Wall* replied, that he had made no promise to his daughter, which he did not intend to perform; and

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said he would marry her, and did so that week. This witness says, that besides himself there were present *Richard Webster*, *Joseph Alley*, *Phillip Alley*, and a female named *Crawford*; that *Webster* was the person sent for *Wall*, and had gone before he, *Scales*, got to *Walker's*, and that *Wall* and *Webster* came back together.

Many depositions have been taken to prove frequent disagreements between *Walker* and *Wall*. They establish, that *Walker* made two wills, in favor of *Wall* and his family, and destroyed both, while displeased with *Wall*; that they twice separated, and that *Walker* declared he would leave them nothing. *Wall's* wife died shortly before her father; and the old man himself died after a very short illness. There is also evidence, and a great deal of it, respecting the possession of a tract of *Walker's* land, on which *Wall* built a mill, and whether that was built out of the funds of the one or the other. The whole of these proofs are laid out of the case; because the circumstance itself is only material, as denoting the existence and nature of the original agreement; and is not sufficient, if established, according to the wishes of the Defendants, to repel the mass of direct proof of the agreement. And on the other hand, it is not needed by the Plaintiffs to support their witnesses, who speak to the agreement.

The witness, *John Scales*, further states, that hearing *Walker* was sick, he called to see him; found him very ill, and uneasy because he had no will. He said, that he wished *Betsey's* children to have his estate; that if he had succeeded in his attempt to legitimate her by act of Assembly, that would have secured it; and that he had intended making another will. *But the still hoped, that the contract made with their father before marriage would carry the estate.* *Walker* died the next day.

The answers do not admit, or positively deny the agreement. But this witness, if credible, proves it

clearly; and also proves, that its recognition was the last act of the father's life.

Attempts are made to discredit *Scales*. Two persons speak of his general character being bad; while many others prove it to be very good, and that if the agreement be not established, his wife's mother, being *Walker's* sister, has a large share of the estate. An effort is made to contradict him. *Webster* says, that he did not see *Scales* at *Walker's*: that *Elizabeth*, without her father's knowledge, desired him to go for *Wall*, whom he found at his father's, and to whom he delivered the message, stating the discovery which had been made. He says, that *Wall* said he did not believe that to be her situation, but went, and on the way declared that he would perform all his promises. Upon getting to *Walker's*, he met *Wall* at the porch with his gun, and threatened to shoot him; that the gun was taken away from *Walker*, and he, *Webster*, went away without going into the house. This was two hours in the night. This plainly does not contradict *Scales*, but supports him, as far as it goes. *Scales* might have been in the house; or he might have been at the door, and not seen by *Webster* in the dark, or attracted his attention in the affray.

Philip Alley says, that he lived at *Walker's*: that *Scales* was there in the evening, but had gone away before *Wall* came, he thinks; at any rate, that he does not remember seeing them there together. But this witness admits that he himself was there, and heard what passed between *Walker* and *Wall*, and in a second deposition, he states the whole substantially as *Scales* does; and in many important particulars, literally so: as does *Joseph Alley*, the other person said by *Scales* to have been there. And it is in proof, by a person who staid at *Scales's* on that Sunday night, that when he came home, he gave his family a relation of all that passed, corresponding with his deposition. And *Orr*, who is one of the witnesses, who

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says *Scales'* character is not good, admits that on Thursday morning, the wedding day, *Scales* told him the marriage was to take place, and upon *Orr's* expressing a doubt whether *Wall* would marry the girl, said he certainly would; for that *Walker* had agreed on Sunday night, to give them all his property; and then proceeded to relate what he heard pass, as it now appears in his deposition.

Divers witnesses speak to *Walker's* frequent declarations in favor of *Wall*, after the marriage. But it is unnecessary to advert to them particularly, because unless very precise in their terms, and appearing to be deliberate, and made with a view of having evidence to them, the Court would not perhaps decree on mere subsequent declarations. They might rather be considered as testamentary, than as establishing a contract.

But I will not omit the statements of two other witnesses, who testify to conversations in the intermediate period between Sunday and the marriage. The one is *John Whitworth*, who says, that *Walker* was very uneasy at his daughter's situation; and told him, that the parties had been engaged for a considerable time, and that he had promised *Wall*, if he would marry her, he would leave them all his estate at his death. The other is *Richard Wall*, the father of the Plaintiff. He says, that *Walker* came to his house, and applied to him to promote a speedy marriage, and declared that if it took place, they should have all he was worth at his death.

Upon this proof, the Court cannot but establish the general agreement alleged in the bill, that *Walker* should, at his death, devise, or in some other way settle, his whole property upon the parties to the marriage, or their family.

To the validity of this agreement several legal objections have been made at the bar.

The first is, that it was without consideration, since *Elizabeth* was a bastard, whose relation to *Walker* is not

sufficient to raise a use. If this contract rested between *Elizabeth* and her father, the objection would be a good one. But *Wall* intervenes, and *his* marriage is the consideration, and extends beyond himself, and embraces his wife and children. Parties to marriage agreements may well, and generally do bargain for the wife and issue; because no man chooses to be burdened with a family without a provision.

Another is, that the agreement is founded in the criminal seduction of the daughter, and was extorted from *Walker*, in a moment of passionate grief at her disgrace, and ought not to be enforced. Whether this reason, if founded in fact, would reach the children, and not be restricted to *Wall* himself, and so would not benefit the Defendants, but only confine the relief to a part of the Plaintiffs, need not be considered; because the Court thinks, there is no ground for it in the evidence. If it could be seen, that the estate was *Wall's* object; that he obtained the confidence of the father, and the affections of the daughter, for the purpose of betraying both, as a means of securing a settlement; or even after he had degraded her, that he delayed to fulfil his engagement, for the sake of getting a specific contract, which he knew the state to which he had reduced the family, would compel them to yield, the Court could not enforce the contract, in favor of the person who had obtained it by such flagitious and deliberate treachery. The extreme impropriety of his conduct is fully felt. But as far as we have evidence, we cannot say that it is not entitled to all the palliation, which passion and youth—not refined and guided by an elevated sense of honor and a better education—can give. No deeper and more selfish purpose seems to have been cherished by him. He was not himself aware of the full consequences of the immoral intimacy, until *Webster* communicated the young woman's message. He promptly obeyed it—expressed his disbelief in it—and voluntarily declared his obligation and intention to marry her. It

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is true, he did not appear before her father, professing that penitence which he ought to have felt; nor offering that reparation that was due from him. Perhaps the violence of *Walker* put it out of his power to exhibit the emotions he felt. Self respect was an insuperable obstacle to doing even justice, when demanded at the muzzle of a gun, and that in the presence of the woman, whom he had promised and intended to make his wife. He must have been dastardly, as well as criminal, if he had said less than "I am not to be forced into measures." But as soon as *Walker* desisted from violence, and was accessible and appeasable, *Wall* declared himself ready to perform all his promises. There was no hint or insinuation about the estate on his part. All that came from *Walker* himself, and not for the first time; for he said, "I have always told you, that I had willed *Betsey* my "property. Did I not tell you so, when you asked me "for her?" And he has proved a kind and affectionate husband, and a provident head of a family.

The last objection is, that this contract has nothing specific in it, and did not bind the property. That is true; but it bound *Walker*, and his heirs and executors. A general covenant to settle lands does not create a lien on any particular lands; but it is a debt on the estate. *Walker* could certainly dispose of his property, sell it, and waste the money. Purchasers would have a good title, unless they became so, for the purpose of enabling *Walker* to evade the contract. But volunteers are bound by it, just as much as if a bond had been given; and there are several cases, in the books, of two persons giving bonds to make the one the other's heir.

The generality of the agreement however makes it necessary that it should be considered, in what way the estates are to be settled. The contract was to give *Wall* and his wife the estate at *Walker's* death. This, literally taken, would vest the whole personalty in *Wall*. It appears that *Walker* made two wills, in one of which he

devised to *Wall* himself; in the other to his wife and children. *Wall* was privy to, and satisfied with each. The spirit of the agreement probably was, as understood by them, that *Walker's* estate should come into the family; and he would have considered himself as fulfilling it, by devising to all or any of them. Had he done so, it is not certain that his disposition would have been disturbed. But as he died without expressing his wishes, the Court is obliged to execute the agreement upon general principles—which lead us mainly to the case of the issue of the marriage, whose interests must be taken as weighing most with the party, from whom the estate moves. In the present case too the difficulty is the less, because the Plaintiff, *William M. Wall*, submits in the bill to take in connexion with his children. The nurture and education of the children, and the respectability of the family and their advancement in life, when they shall grow up, require that the father should have a life estate in the whole, with the power of giving to each of the children his or her share, the sons at full age, and the daughters at marriage or full age: remainders to the children as tenants in common, with cross remainders between themselves, upon their death under age and unmarried:—which will be ordered, unless the parties lay another settlement before the Court, which will be more to the interest and convenience of the family.

The Master must therefore be directed to inquire, what real and personal estate *Abner Walker* left, and take an account of the same in the hands of the administrator and heirs at law, and of the rents, issues and profits: And the Defendants, the heirs at law, be decreed to deliver up the possession of the lands to the Plaintiff *William M. Wall*; and upon the coming in of the report, to execute conveyances for the specific lands therein found, to be approved by the Clerk of this Court, to a trustee to be named by the Plaintiffs, upon the trusts before mentioned.

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Per Curiam.—Declare the marriage agreement charged in the bill to have been made between the Plaintiff and his wife *Elizabeth*, of the first part, and *Abner Walker*, reputed father of said *Elizabeth* of the other part, that said *Walker* would devise to or settle on the Plaintiff and his wife, if they intermarried, his whole estate real and personal, at his death, to be established: declare further, that said *Walker* having died without making any devise or settlement of his said estates, this Court will order the same agreeably to Equity; and thereupon decree that the Defendants do forthwith surrender into the peaceful possession of the Plaintiff all the lands which said *Abner* died seised of or entitled to, and which descended to said Defendants as heirs at law, and are now in their possession respectively, to be settled as hereinafter directed; and order further that the Clerk inquire what particular lands descended from said *Abner*, where situate &c. And it is referred to the Clerk to take an account of the rents &c. and also an account of the personal estate of said intestate, in the hands of his administrator, and report the particulars, after allowing just disbursements and charges: and decree further, that upon the coming in of said report, whereby the said estates shall be ascertained, the same shall be conveyed by proper parties to a fit trustee, in trust for the Plaintiff during his life, remainder to his four children, with cross remainders between the said four children, if any of them should die under the age of twenty-one years and unmarried, with power to the Plaintiff to give to each of the said children, his or her share or fourth part, the sons respectively upon their arrival at full age, and the daughters respectively upon their arrival at full age or marriage; unless in the mean time the parties lay before the Court another settlement &c.

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Although a misdescription of land, as to the County in which it lies, would not vitiate in a deed between individuals, it seems, that a similar mistake in a grant would avoid it even at Law; because the grant is founded upon an entry and survey, which are to be made by sworn officers in the very County mentioned.

But if such misdescription in a grant does not avoid it, clearly an entry made in one County, when the land lies in another, is void. And a Court of Equity will not compel another person, who made an entry and obtained a grant of the same land, with notice of the former defective entry, to convey to the first enterer.

Where the Plaintiff averred, that land entered by him was situate in one County, where he made his entry, and that the Defendant had, with notice of his entry, obtained a grant for the same land, upon an entry made in another County, it was held, that if the land did lie in the County where the Plaintiff's entry was made, his title was purely legal, and the remedy at Law complete.

A reference is never made, to establish a fact put in issue by the pleadings; but always relates to some matter supplemental to the relief granted at the hearing.

The bill was filed in the year 1820, and the Plaintiff alleged, that in October, 1811, he made an entry of 640 acres with the entry-taker of Burke County, "adjoining his own line, and *Jacob Bostion*, and the Iredell County line." That on the 8th of January, 1812, a warrant of survey issued to the Surveyor of Burke County, which was returned, and on the 24th of November, 1813, a grant of the land, thus entered and surveyed, was made to him. That the Defendant, having notice of the entry above mentioned, had in December, 1811, and January, 1812, made entries of part of the same land, with the entry-taker of Iredell County, and had, by falsely suggesting the land to be vacant, obtained grants thereon in December, 1812, and that the Defendant had taken possession of the land covered by his grant, and refused to surrender the same to the Plaintiff. The bill then

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averred, that the land granted to the Defendant was actually situate in Burke County, and prayed that the Defendant might be decreed to be a trustee for him, and for a conveyance.

The Defendant, in his answer, admitted, that after the entry made by him, which he averred, was in December, 1810, and before a grant issued thereon, he heard that the Plaintiff had made an entry of the same land. He stated, that he could not answer with absolute certainty, whether the land was situated in Burke or Iredell, as the line between the two counties had never been properly settled; but averred, that according to his honest belief, it was in the county of Iredell—his entry called for the dividing line between the two counties. The entries and grants were filed, and from them it appeared, that the Defendant was correct in his account of their respective dates.

A replication to the answer was filed, and many depositions respecting the line between the two counties, were taken. A summary of them will be found in the opinion of his Honor Judge RUFFIN.

Gaston, for the Plaintiff.

No Counsel appeared for the Defendant.

RUFFIN, Judge.—The bill is filed to obtain a conveyance of a tract of land, which the Defendant entered in Iredell County; for which, in December, 1812, he obtained a grant, describing it as lying in Iredell. The Plaintiff alleges, that the land is in fact situate in Burke County, and that before the entry of the Defendant, and within his knowledge, he had himself entered it in Burke, and obtained a grant in November, 1813.

Upon that notice, and upon the distinct ground, that the Defendant's entry and grant are void, because the land lies in Burke, the equity of the bill is raised.

The answer and the Defendant's grant show, that one of his entries was prior to that of the Plaintiff. But it is unnecessary to discuss the particular circumstances on that point, since the opinion of the Court is determined by other considerations.

The first observation which occurs is, that if the principle assumed in the bill, that the validity of the entry and grant depends upon the land being in the county mentioned in it, be correct, notice is immaterial. For the Defendant's defective title would not be helped, by ignorance of the previous valid entry of the Plaintiff. On the other hand, if the land lie in Iredell, and the Plaintiff's entry of it in Burke be, for that reason, void, knowledge of it would not affect the Defendant. If he knew of it, he knew also that it was void. For if the entry created no obligation on the State, to perfect the Plaintiff's title by a grant, it could not oblige the Defendant, in conscience, to convey to the Plaintiff the legal title, which the State had conferred on him. The two titles coming through different sets of officers, of whom only one had authority to perform the acts necessary to precede the issuing of the grant, they are as distinct and independent, in reference to this question, as if they had been derived from different persons. The doctrine of notice is therefore inapplicable; and the cause stands upon the intrinsic strength of the respective titles of the parties.

Taking the fact for granted, that the land lies in Burke, it may however be inquired, what equity the Plaintiff has, or how he gives this Court jurisdiction? If it be true, that a grant for land lying in one county, which describes it as lying in another, be void, the plain, direct and complete remedy of the Plaintiff would seem to be at Law. Both the matter of fact—the location of the land—and the operation of the grant, are properly triable there. The Plaintiff does not stand upon the equitable title of his entry only. He is armed with a

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grant, appearing to be a legal title; upon which he must recover in an ejectment in Burke, notwithstanding the Defendant's grant in Iredell, if the latter be void. If indeed it was not void, or even if a Court of Law had held upon an ejectment, that being the first patent, it passed the legal title, notwithstanding the falsehood on its face, it would be a different matter. This Court would then inquire into the preferable equity, arising out of the respective entries. But the Plaintiff has not established his own title at Law, so far as it depends upon the actual location of the land, nor obtained the opinion of a Court of Law, upon the legal operation of the Defendant's grant. He comes here for a decision of both these points; though the latter is purely a legal question. His bill is, in truth, simply an ejectment bill, against the tenant in possession, to try the strength of two legal titles; of which he pronounces his adversary's void. Such a bill cannot be entertained.

If however the Court could perceive, that the Defendant's legal title was not void, and would at Law defeat the Plaintiff's, his equity would certainly be sustained here, notwithstanding the judgment pronounced by himself upon the Defendant's grant. It is not absolutely necessary to the decision of the present case, that the legal validity of a grant, describing the land to be in a wrong county, should be determined. No conclusive opinion will therefore be given on it. My own impression is, that such a grant is void. I will not say that would be the case with deeds between individuals; for the county is only a part of the description, and might probably be corrected by the more specific description by natural, or other boundaries. Nor do I think a description in a grant must in all respects be consistent. Ordinarily, ambiguities arising upon evidence may be explained in the same manner; and many rules have been laid down for their construction, having respect to the objects called for, and among them, the most conspicuous, per-

manent and least deceptive. But the county, in which the land lies, seems, under our statutes, to be of the essence of the description in a patent. The State has a right to know what land she grants, and where situate, and that she grants it upon the representations, under oath, of her proper and responsible officers. It is true, that in general, a Court of Law cannot, in a collateral proceeding, look behind the grant, into any irregularity in obtaining it. Its validity must be put directly in issue. But this objection arises on the face of the instrument, and relates to the thing conveyed, in terms, by it. The grant follows, in the description, the plot and survey; of which duplicates are required to be filed in the Secretary's office, and one appended to the grant, as a part of it. This survey can be lawfully made only by the Surveyor of the county in which the land lies; to whom the entry-taker of that county issues a warrant. By the act of 1777 (*Rev. c.* 114) an entry-taker is appointed for each county, with whom "any person may enter a claim for *land lying in such county.*" The entry is to be made "in writing, setting forth" (among other things) "the name of the county in which the land is situate." With that entry taker, *caveats* are to be lodged, and upon his certificate, they are to be tried on the premises by a jury of the same county. It cannot be held, I think, that a grant, purporting to convey lands thus entered and surveyed, according to law, by those appearing to be the proper officers, should convey land, entered with and surveyed by officers who had no authority touching the matter. It is of the substance of a patent, that the land should appear to be situate in some county; and a reference to those provisions of the statute proves, that the true county ought to be stated. If a grant for land in one county would pass land in another, then the entry, upon which that grant is founded, must likewise be held to be good. This would lead to a vagueness, un-

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certainty and contradiction, in the terms of an entry, which would defeat the whole purpose of requiring any description in the entry; and would entangle titles beyond the ability of man to unravel. The county thus forming a material and essential part of the description in the entry, expressly required by the statute, it must be of the like important consequence in the grant, which is founded on and follows the entry in that respect. It cannot, in general, therefore, be departed from. And if the land, as described by metes and bounds, cannot be found in the county mentioned, the grant must be inefficacious to pass it, by reason of the insufficient and incongruous description. I have laid this down as the general rule. I do not suppose it a universal one. I can readily suppose an exception to it. Perhaps there may be others. If, for instance, an entry were properly made, and a warrant issued, and before its execution and the return of the survey, the name of the county were changed, or the county divided, and then the survey were returned, and followed the entry and warrant, the grant might not be avoided, although the land, at the time of issuing the grant, did not lie in the county therein named. But in that case, the land would form a part of the same identical territory, under whatever name it might be known. In the case before us, that is impossible; for the same spot cannot be at once in two counties. But, without deciding this point, it is a sufficient objection to the present bill, that the Plaintiff has made no attempt to have the judgment of a Court of Law upon this legal question. Until he shall have failed there, he has no occasion, nor excuse for coming here.

If however a Court of Law had so decided, as to make it necessary for the Plaintiff to abandon his legal title, and relying upon his entry alone, to ask the aid of this Court, it would then have to be considered, how his equity stands on that. If the entry be void, it gives him no equity. The same provisions of the act of Assembly and

the same reasoning, which have been supposed to render inoperative the grant, apply with equal and greater force to show the entry to be void. In one respect, the entry stands on less advantageous ground than the grant. The latter is, in each case, issued by the same officers—the Governor and Secretary of State. Its defect consists in a description, which is materially false, and cannot be corrected. But the entry is defective, not barely in describing the land as lying in the wrong county, but also in being made with an officer who had no authority to receive it, and surveyed by another equally unauthorized. As the entries of the Plaintiff and Defendant are made in different counties, and their calls are for the same county line, *on opposite sides of it*, unless the utmost latitude and vagueness of description be allowed, it seems to be impossible that they can ever come in conflict.—But if in fact the same land has been surveyed under them, the one or the other must be void. Which of them it is, depends upon the question, in which county is the land? That fact is directly put in issue by the answer, in which the Defendant states, that he did "honestly believe" at the time he entered, and at the time of answering—in 1820—that the land was situate in Iredell, and not in Burke. The burden is thrown on the Plaintiff of showing the contrary, and he has had full time to do it. Commonly the limits of a county, being of general interest, are specifically fixed by law, designated in surveys made under public authority, and notorious. Such public documents, or even a reputation, general and undisputed, and acted on by the authorities on both sides of the line, would be *prima facie* competent to establish the line, in a private controversy of the present nature. But the answer states, that the line was never "properly settled;" and in this particular all the witnesses, on both sides, agree with it. The Court will not say, that its situation might not be proved by witnesses, upon their knowledge acquired by surveys, not made under public authority,

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nor in the cause. Certainly a survey of one or the other of the latter kind would be most satisfactory. But no survey of any kind appears in the proofs before us. The parties have relied on the opinions of their witnesses; and they are given without any sufficient grounds on which to found them. One witness barely states, that he believes the land to be in Burke. Another states, that from a survey he made, he thinks about one hundred and twenty acres lie in Burke. But we are not told what survey he made, whether of the land or of the county line; if the latter, where he began or went to, nor his reasons for adopting either *terminus*. Such evidence is not sufficient proof of an ordinary line between individuals—much less a public and disputed boundary. But its feeble strength is further impaired by the contrary opinions of the Defendant's witnesses. Five or six of those declare, that before the Defendant made his entry, "a rough measurement" was made, to ascertain the line. They all thought the land was in Iredell; and the Defendant then entered. The fact in dispute—the boundary between the two counties—is susceptible of clear proof, and ought not to be established upon less proof. But the Plaintiff has not rendered his allegation of it even probable. The Court is therefore obliged to declare, that the land covered by the Defendant's grant does lie, according to the terms of the grant, in Iredell County.

The counsel for the Plaintiff has asked for an inquiry upon this point. A reference is ordered, to ascertain the mode and extent of the relief, which the particular circumstances may require, after a decree, upon the hearing, establishing the right to some relief. Where a mortgage or a partnership is declared, accounts are ordered. Where an agreement for a sale under a general description is established, the estate may be further identified by a survey. But a fact constituting the *gist* of the controversy, and directly put in issue by the pleading, must

be proved before publication. It enters into the Plaintiffs title, and must be established on the hearing; else there is no case upon which to institute an inquiry. It is never referred to the Master, whether a party can supply a deficiency of evidence to make a case. If it were, inquiries would be interminable, and the final decree indefinitely postponed. Inquiries relate to matters, supplementary to the general relief decreed on the hearing. If the Plaintiff had proved, that some of the land certainly lay in Burke, but it did not appear what part in particular, and it was deemed necessary to the clearness and precision of the decree, that such part should be designated by the particular metes, bounds and quantity, a survey would be ordered, to establish those facts. But here, no part of the land is shown to be so situated. The Plaintiff has therefore failed to prove the case stated in his bill; and the Court cannot supply the deficiency, but must dismiss the bill.

Per Curiam.—Declare, that the land granted to the Defendant is not proved to lie in Burke County, and is therefore held and deemed to lie in Iredell County. Declare further, that if the land did lie in Burke County, the Plaintiff would be without any matter of equity, upon which to ask the aid of this Court, since he hath obtained a grant from the State, for the land claimed by him, and may for any thing appearing to the contrary, have a direct, speedy and complete remedy at Law, and therefore decree that the bill be dismissed with costs.

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James C. Jones
v.
Marmaduke Jeffreys & William Boylan. } From Franklin.

Where a Plaintiff seeks to enforce an Equity against Law, he can have no relief unless the person who has the legal title be a party to the suit.

The Plaintiff alleged that a tract of land, held in common by a number of persons, was, under an order of the Court of Equity for the county of Franklin, sold by the Clerk and Master, for the purpose of dividing the proceeds among the tenants, instead of making a partition thereof—That at the sale, he, and the Defendant, *Jeffreys*, purchased it, and executed their joint bonds to secure the purchase money—that the sale was, upon the report of the Master, confirmed; but that no deed had ever been executed to either the Plaintiff or Defendant, *Jeffreys*—that *Jeffreys* had become insolvent, and that the Plaintiff had been forced to pay the whole amount of the purchase money. The Plaintiff then charged, that the Defendant, *Boylan*, had purchased of the Defendant, *Jeffreys*, with notice of the Plaintiff's Equity, and he sought to subject the land in the hands of the Defendant, *Boylan*, to the payment of one half the purchase money.

Seawell, Badger & W. H. Haywood, for the Plaintiff.

Cameron, for the Defendant.

Hall, Judge.—Upon looking into the bill in this case, it appears, that the petitioners who filed the petition in the County Court of Franklin, for the sale of the land in question, and in whom the title to the land is stated to be, and the Clerk and Master who sold the said land, are not made party Defendants to the bill. So that the Court, in case the allegations in the bill were fully proved, could not make a final decree in the case for want of parties.

Per Curiam.—Let the bill be dismissed with costs.

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Henry Stevens, ex'r. of Letitia Gardner, v. Horace Ely, } From Beaufort.

Slaves can only be held as property; and conveyances, having for their object either their emancipation or a qualified state of slavery, are against public policy, and a trust results for the donor or his executor.

As where slaves were conveyed in trust to permit them to live together, and be industriously employed, and that the donee should exercise a control over their morals and furnish them with necessaries—it was *held*, upon the face of the deed (HALL, Judge, *dissentiente*) that as the slaves were not considered the property of the donee, a trust resulted to the executor of the donor, and a conveyance of the legal title was directed to be made to him.

Per HENDERSON, Chief Justice, *arguendo*. Where the legal estate passes, trusts annexed to it, which are either illegal or impolitic, are avoided, and a trust declared for the donor, or the donee declared to hold discharged of any trust, as will best tend to suppress the illegal purpose.

Also, *per* HENDERSON, Chief-Justice, *arguendo*. In a will, estates are created by the intent of the devisor, however expressed; but to the creation of the same estate by a deed, certain technical words are necessary. But when the estates are created, whether by deed or will, they possess similar qualities; and the same circumstances will in one case cause a trust to result for the heir, and in the other for the grantor.

The cases of *Haywood* v. *Craven* (1 *Law Rep.* 557) and of *Huckaby* v. *Jones* (2 *Hawks* 120) approved.

The Plaintiff alleged, that his testatrix, intending to emancipate her slaves, consisting of a woman and her children, conveyed them to the Defendant, in consideration of £5, "in trust, that the said *Ely*, his heirs, &c. "shall, from time to time, permit the said negroes and "their increase, to live together, upon his, the said *Ely's* "land, and to be industriously employed, and continue "to exercise a controlling power over their moral condi- "tion, and to furnish said negroes with the necessaries "and comforts of life." That by an endorsement on the

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deed, it was agreed, that Plaintiff's testatrix should have the use of the said slaves from year to year, during her life, in consideration of which, she covenanted to pay the Defendant one shilling for each year—that his testatrix, by her will, bequeathed the negroes to her sister, and that directly after her death, the Defendant took them into his possession.

The Plaintiff averred, that this deed was executed with an intent to procure the emancipation of the slaves, and that being against the policy of the law, a trust resulted for his testatrix. The bill prayed for a reconveyance of the slaves, and for an account of the profits received by the Defendant.

The Defendant, in his answer, denied that there was any trust between him and the Plaintiff's testatrix, to procure the emancipation of the slaves conveyed to him; or that he had agreed to hold them in any way but that mentioned in the deed, and insisted, that the deed was executed by the testatrix, from a wish to do him, the Defendant, a favor.

Replication was taken to the answer, and witnesses examined. Among them, the Register, *Mr. Ellison*, swore, that when the Defendant came to have the deed registered, he observed, that the old lady had conveyed the negroes to him, for the purpose of having them emancipated.

A copy of the will of the Plaintiff's testatrix was by him filed, as an exhibit in the cause.

His Honor Judge Norwood, on the Spring circuit of the year 1829, declared that the Defendant held the slaves as a bare trustee—that the trust was one contrary to the policy of the law, and resulted for the benefit of the Plaintiff, and decreed a reconveyance by the Defendant, upon having the consideration money refunded to him, and directed an account of the rents and profits.—From which the Defendant appealed.

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The case was argued at December term, 1829, by *Badger & Devereux*, for the Defendant, and by *Gaston*, for the Plaintiff; and at the last term, by the same gentleman for the Plaintiff, and by *Hogg*, for the Defendant. For the Defendant were cited, *Curtis* v. *Perry* (6 *Vesey* 739) *Cecil* v. *Butcher* (2 *Jac. & Walk.* 565) *Brackenbury* v. *Brackenbury*, (*ditto* 390).

For the Plaintiff, *Cruise Dig. Trust*, c. 1, s. 2, 7 & 28. 2 *Thom. Coke Lit.* 702, *note*. *Robinson* v. *Taylor* (2 *Bro. C. R.* 594) 2 *Fonb.* 117. *Birch* v. *Blagrave* (*Amb.* 264) *Ward* v. *Lant* (*Pre. Ch.* 182) *Collington* v. *Fletcher* (2 *Atk.* 155).

HENDERSON, Chief Justice.—Were this donation by will, and the object to emancipate, the case of *Haywood* v. *Craven* (2 *Law Rep.* 557) is an authority to show, that a trust results to the heir at law, and next of kin. If the object be, to hold the negroes, not as property, but in a qualified state of bondage, the case of *Huckaby* v. *Jones* (2 *Hawks* 120.) shows that a trust also results.—It is unimportant therefore to inquire whether the object of the parties was, that the Defendant should emancipate the slaves; or that he should continue to hold them in the manner pointed out in the deed.

His Honor then stated the declaration of trust as above, and proceeded as follows: These trusts exclude the idea, that he should hold the negroes as property. And the policy of the law forbids, that they should be held otherwise. The trust therefore falls off, and the Defendant holds them as property freed from the trust; or the beneficial interest results to the grantor; or rather, never was out of her. I shall not examine the cases which were cited and commented on at the bar. They all go to prove, that unlawful trusts, motives or intents render the grant void or not, as will best tend to suppress the illegal act, or intent contemplated. Or if they do not render the grant void, they either fall off or result, as will best effect the

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same object. And here it is observable, that there is no base design, on the part of the maker, to do an immoral act, to cheat or defraud another. The act is forbidden only by the stern policy of the State, necessary to support our institutions in regard to slaves; but there is nothing *malum in se* in the act. Nor did she attempt to conceal or disguise her object, but placed it in her deed, to be put on the public records. There is nothing therefore, which forbids this Court to give to her her legal rights. We cannot say that her hands are unclean; and therefore we will not aid her, or give her that which in strict right she may be entitled to. For sensitive as we are, and ought to be, as to whatever may interfere with our laws on the question of slaves, and however severely we may punish, and ought to punish those, who in the most remote manner attempt to weaken the bonds, by which we hold them, yet these sensibilities are not roused, or acted on against a single female, who from feelings of kindness towards her three or four slaves, or from feelings of conscience, endeavors to better their condition, who has acted openly, and who from the publicity which she has given to her act, did not intend to offend against the law; it is sufficient for her to feel the direct effects of her unlawful act, without also subjecting her to its indirect effects. This consideration frees this case at once from the operation of those cases, where a fraudulent or dishonest grantor comes into this Court to annul his deed. Against her merits the Defendant has none. He is a mere volunteer, and now attempts to hold the negroes as slaves, in fraud of his agreement with her. Sound policy, perhaps, would require that the slaves should be forfeited. But we have no authority to make, only to declare the law.

Had this case arisen on a will, there would not have been even an argument attempted to disprove a resulting trust. But being in a deed, it is said, that no such trust arises. And the reason assigned for this difference is,

that in a will the intent alone is regarded, which shall be executed; but not so in a deed. Is this rule applicable to the present case? It is true, that certain technical words are required by law to express certain intents in a deed; the word *heirs*, to denote that perpetuity necessary to give a fee-simple: the words *heirs of the body*, to create an estate tail. But in a will, no particular words are necessary to denote an intent; any significant words will do. But when the intent is thus fixed and ascertained, the thing created possesses the same qualities, whether created by the technical words required in a deed, or the significant words used in a will. A fee-simple is a fee-simple, and nothing more or less, whether created by deed or will; and the law will not permit an illegal estate to be created by either. Nor can an estate, which would be illegal, if created by deed, be legal, because created by will. Neither can qualities be given to it by one, which it is unlawful to give to it by the other, or which the other cannot give. That a different rule prevails in arriving at the intent, that a word would create a thing in the one, which it would not in the other, is admitted. But this is a rule in regard to the construction of the instrument. There can be no reason for raising a resulting trust for the heir, which does not equally operate to raise one for the grantor. It is said, that the heir takes all that the ancestor does not devise to another. The grantor retains all that he has not given away; and if the grantee cannot take the beneficial interest, it remains in the grantor. For to every grant there must be a grantee—a taker. It is said, that the grantor had forfeited her estate, by attempting an illegal trust. So has the devisor, and his heir takes nothing but what his ancestor had at his death. It is said, the forfeiture is inflicted on him, to prevent the commission of such acts. Our own feelings, nay, our holy religion tells us, that we are more restrained by punishment to be inflicted on our children for our

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crimes, than on ourselves. So that policy is on the other side. I cannot therefore distinguish this case from a similar disposition made in a will.

RUFFIN, Judge, concurred.

HALL, Judge, *dissentiente*.—This case differs from ordinary sales in this: the vendee is "required, from time to time, to permit the said negroes and their increase, to live together upon his land, and to be industriously employed, and to continue to exercise a controlling power over their moral conduct, and to furnish said negroes with the necessaries and comforts of life." And the question is, whether this stipulation, request or confidence, renders the bill of sale void, and the Defendant a trustee, so as to be compelled to reconvey the slaves mentioned in the bill of sale, to the Plaintiff. The question is the same, as if the Plaintiff's testatrix were still alive, and sought for a reconveyance. If she could not succeed, so neither can he.

It is proper to view the case as it really is, and to consider that no other trust is created in the vendee, than that which is expressed in the bill of sale. In that trust, I see nothing illegal or immoral. It is a trust, request, or confidence, reposed in the vendee—a confidence not controllable, or intended to be controlled by any judicial tribunal. The legal title to the slaves passed for a price, far below their value. But the vendor stipulated for their good treatment, and reserved the use of them to herself for life.

Therefore considering the bill of sale to mean nothing more than it expresses, I am obliged to say that the Defendant cannot be deprived of the property in the slaves.

But it is attempted to prove that the bill of sale was made for the purpose of having the slaves, therein conveyed, emancipated; and the will of the vendor is produced, as in part evidence of it. I think it is unnecessary to notice the contents of the will, because certainly

it is not evidence against the Defendant. It was made after the date of the bill of sale, and contains the declarations of the vendor herself.

The testimony of *William Ellison* has been taken. He says he heard the Defendant say, that the slaves conveyed in the bill of sale by *Letty Gardener* were to be emancipated after her death. This evidence cannot be received, to raise a trust upon the bill of sale, where none such is expressed; altho' it might be received for the purpose of proving a fraud in the Defendant, in procuring the bill of sale to be executed upon such secret trust. But I think it insufficient for that purpose, contradicted, as it is, by the Defendant's answer.

Supposing at the date of the bill of sale, it was the desire of the vendor, that her slaves should be liberated at her death, but she considered that to be a forlorn hope, as being against the laws of the country; and that she concluded, as the next best thing she could do, to convey them to the Defendant in the manner which she has adopted. She certainly had a right to do so. It might have been more prudent in her to insert a power of revocation in the bill of sale. But her omitting to do so cannot affect the question before the Court.

Viewing the Defendant as the owner of the slaves, if he deviates from those duties which the law requires a master to observe, as by lettting them hire their own time, he is answerable for such misconduct, as any other master is.

PER CURIAM.—Let the decree of the Court below be affirmed.

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Sarah Green
v.
Wm. Branton & Eliz. Branton, } From Pitt.

New matter, brought forward in the answer as a defence, which would have aided the Plaintiff, had the bill been framed with reference to it, cannot be used to sustain the relief sought.

A married woman can be bound as to her land, there being no separate estate, only by her deed executed in the prescribed form, or the decree or judgment of a Court, and if her deed be informal, it cannot be aided.

Where the husband, with the wife's privity and consent, sold her land, and she received and enjoyed the purchase money, upon her bill to be relieved against an obstacle to her, in asserting her right to the same land, her fraudulent conduct does not bar her—and an outstanding legal estate, which otherwise she had a right to have removed, will not be held up as a security for the purchase money.

A wife is in all cases barred by a judgment against her husband and herself, obtained during the coverture, unless obtained by a combination between the other party and the husband, in fraud of the wife's rights—and if the husband, for his own convenience, declines to defend the suit, the wife cannot have the judgment reversed, simply because it was unjust.

As where the husband and wife were served with a *sci. fa.* to subject her land to her father's debt, and the husband, without collusion with the Plaintiff, or the administrator, declined defending her interest—it was *held*, that the wife was barred by the judgment.

The bill charged, that the Plaintiff's father, *Samuel Branton*, died in 1800, leaving four children, *William*, *Samuel*, *Elizabeth*, then intermarried with *Matthias Holstein*, of Pennsylvania, and the Plaintiff, then intermarried with *George Green*: That the father died seised in fee of the land in dispute, and intestate: That his two sons administered, and received personal assets more than sufficient to pay all his debts; which consisted in part, of a debt to one *Standley* of £31. 1 and of a debt to one *Curl*, of £24. 2: That the two sons fraudulently bought in all the personal property under *Standley's* execution, so that there was nothing left to satisfy *Curl*, who sued on his bond and got judgment, tho' the plea of

fully administered was found for the administrators, in consequence of their fraudulent combination: That a *scire facias* issued against the heirs, and a judgment was taken against the lands in their hands, on which they were sold, and the two sons became the purchasers at a very inadequate price: That there were in fact personal assets sufficient to pay that debt, but that the sons refused to pay it, with a view of buying the land, and defrauding their sisters of their shares: And that to effect this purpose, they combined together, and with *George Green*, the Plaintiff's then husband, not to make defence to the *sci. fa.* and for that purpose, they gave *Green* $400, in consideration of which, he did not defend the Plaintiff's interest against *Curl's scire facias*.

The bill then charged, that *Green* was dead; that *Holstein* and wife had conveyed to the Plaintiff; that *Samuel*, the younger, was also dead, and that his part of the land had descended to his daughter *Elizabeth*; who, and her uncle *William*, were Defendants. The prayer was for a conveyance of one half of the land of which *Samuel Branton* senior died seised.

The answers denied personal estate of the father to the value of *Standley's* debt, and set up a title by deeds made by the father to his two sons just before his death, and averred, that the sons were advised by Counsel, that those conveyances being voluntary, would not protect the land from creditors; and that apprehending an unjust demand for a large sum would be brought against their father by one *Stringer*, they determined not to pay *Curl's* debt, but suffer the land to be sold for it, and purchase it in, and thus perfect their title: That the sale was regular, and that the sons bought fairly. All collusion with *George Green* was denied; but it was admitted, that he complained that the father had given all his land to his sons, and that to satisfy him for his disappointment, they gave him $400; but the period of that contract was not stated. The Defendants relied upon the opportunity

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of defence to the *scire facias*, and insisted on their title under the execution sale.

Replication was made to the answers, and proof taken; but a statement of it, and copies of the deeds are not material to the point decided by the Court.

Gaston, for the Plaintiff.

Hogg, for the Defendants.

RUFFIN, Judge, after stating the case, proceeded: The deeds made by the father are among the exhibits, and are so defectively drawn as to be wholly inoperative. Besides that, the depositions show, that those deeds were obtained from the old man *in extremis*, and under circumstances which completely invalidate them. It was a gross and unfeeling imposition on the father's weakness. They are not the shadow of a title for the Defendants; but constitute cogent evidence against them. Had the bill been differently framed, those deeds might have furnished a specific ground of relief. If they had been held up by the sons as a title; if that pretence induced *George Green* not to defend the *sci. fa.* upon the idea that his wife and he had no interest, or even led him, in doubt of that interest, to compromise and receive a sum of money, in ignorance of the facts attending their execution, it would be a fraud on him, as well as his wife, which Equity would remove out of their way. But the bill brings forward no such equity. The deeds are not even mentioned in it. The first we hear of them is in the answer. They were not registered until 1819, after this suit was begun. They do not seem, if known to *Green* and wife, to have been acted on by them, or to have influenced their conduct in the least. It is impossible for the Court to proceed on a ground not taken in the bill, or to relieve an equity not raised by the party. We cannot say those deeds had the least influence on the Plaintiff's conduct, or her husband's, when she is altogether silent on that head.

The evidence proves, very satisfactorily, the payment of the sum of $400 to *Green*. Both the bill and the answer leave the time at large. But the depositions prove, that the contract was made, and the payments, after *Curl's* judgment, and the purchase of the land by the brothers. It is clear too, that the whole was with the knowledge and consent of the Plaintiff. She, in fact, made the bargain; and the payment was in provisions for the family. The Defendant's Counsel has endeavored to stand on this arrangement of the wife's, and construes her present suit into a fraud, which shall bar all relief, or make the land a security, at least, for the money advanced.

The contracts of a married woman, except as to her *separate* property, are held, alike in Equity, as at Law, to be void. She can be bound as to her land in only two ways: by her deed duly executed by her privy examination, or by the judgment or decree of a Court. Her deed is a formed legal conveyance; in favor or against which there is no equity. It stands upon its strength in Law. If it is not perfect, we cannot help it here. An agreement, no matter upon what consideration, by a married woman, is an absolute nullity in every Court. We do not take notice, therefore, of any participation on her part in the family arrangement. Nor can the Court allow her husband to treat for the sale of her land, and contrive a conveyance of it without her assent, obtained according to the act of Assembly, under the pretence of a judgment and judicial sale.

We do not lay down the rule, that the husband is bound to pay the debts of his wife's land; that he is legally bound to advance money out of his own pocket, to discharge debts of his wife's ancestor. He may suffer the land to be sold. But a Court cannot hold out temptations to him to betray his wife's interests, and commit a breach of his marital duties. If he will not move to save his wife's freehold, we cannot help it. But he must not

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be kept back by another, and for the sake of mutual gain. He shall not look out for gain at his wife's expense; and he who prompts him to it, shall not profit by it. It is taken to be clear, that if the husband and brothers combined to defeat the wife, it is a fraud upon her, and every thing done under it must be set aside. But the mere negligence of the husband is the wife's misfortune, not the fault of others. Married women are bound by judgments at Law, as much as other persons, with the single exception of judgments allowed by the fraud of the husband, in combination with another. It cannot be said, that when a woman becomes *discovert*, the ground of judgment during coverture must be re-proved by the creditor, or even that the judgment must be set aside, if she can show that it ought not to have been recovered. That is not the kind of fraud that will avoid it. Something else must appear, besides the judgment being unjust. That was a thing, that might have been shown on the trial at Law; and therefore cannot, by itself, be heard now. She must charge and prove, that she was prevented from a fair trial at Law, by collusion between her adversary and her husband, preceding or at the trial. Here there is no evidence to that effect. The husband was served with process, and never stirred in the business. But not the slightest communication between any of the parties is spoken of, until after the sale under execution. Then, a witness says, the Plaintiff and her husband expressed their sense of the wrong done them; and then the brothers agreed to make compensation. It is true, the Plaintiff afterwards urged her husband to sue, and he refused; saying, that she had got the worth of her land, and ought to be content. But that is nothing; for what could he do then? In fine, the only equity which a married woman has against a judgment, which other people have not, is, that she has been deprived of full defence by the contrivance of her adversary. This cannot be the case without the fraudulent collusion of the

husband. This is not shown by the mere inaction of the husband, or even that and a just defence. There must be a dealing on the part of the adversary also. Else he is not to blame, and will not be made to suffer the consequences of her making a bad choice of her husband. It is precisely like the husband letting the statute of limitations run against the wife. It binds her.

The evidence is far from establishing satisfactorily, that there were personal assets; and the debt of *Curl* is admitted in the bill. If however the other parts of the case were made out, an account of the assets would be ordered. The want of them would be conclusive against the bill. Their sufficiency would be material only on the question of collusion; but to that point they would be very important, as a circumstance. But that is not of itself sufficient. I repeat, there must be a combination not to defend. Otherwise, the wife cannot open the case, and carry it back, to have it retried at law. I think it very probable, (tho' there is no allegation or proof, even to that,) that *Green* withheld a defence to *Curl's* debt upon the same motive, which induced the sons to desire a judgment on it, namely, from apprehension of the large unjust debt of *Stringer*. But suppose that: and the Plaintiff is then to be looked on, rather as a party to *that* fraud, than the object or victim of it. It was not directed against her, but the creditor, and is good as against the parties and all else but creditors. The purpose was not to take the land from the Plaintiff, and vest it in the brothers, but to defeat *Stringer*. But even that is not the case before us: which is one altogether without collusion, as relates to the Plaintiff's husband; and without a communication of any sort, or at any time as to *Holstein*.

HALL, Judge.—It appears in this case, from the evidence, that a legal title to the land became vested in *William* and *Samuel Branton*, the brothers of the Plain-

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tiff, as stated in the bill: that the process by which it was sold, as far as relates to the Plaintiff, was regular and legal. There does not appear to have been any fraud, collusion or combination, to defraud the Plaintiff by the Defendants and the husband of the Plaintiff, who had it in his power to defend her interest. If there were assets to discharge the debts of the intestate, there was ample opportunity to do so, on the return of the *scire facias*, on which judgment was obtained for the sale of the land.

PER CURIAM.—Let the bill be dismissed with costs.

Simon Jeffreys
v.
Charles Yarborough et al. } From Franklin.

Where a decree was made for the payment of money against an administrator, and it was ascertained by the decree that he had no assets—*held*, HENDERSON, Chief-Justice, *dissentiente*, that a *sci. fa.* under the act of 1784 (*Rev. c.* 226) is confined to judgments at Law, and that the only remedy for the Plaintiff was by a bill against the heirs, to have satisfaction out of the real assets.

This was a SCIRE FACIAS issuing from this Court. The case made by it, and the decree upon which it was founded, was, that *Charles Yarborough* made his will, and bequeathed a legacy to the Plaintiff, and appointed *James Yarborough* his executor, who received the assets, wasted them and died: That *James* also made his will, and appointed *Henry Yarborough* his executor, and left a considerable personal estate, which came to the hands of *Henry*, who wasted it and died: That *Thomas Yarborough* was the administrator of *Henry*, and had assets only to the value of $74 14: And that *David M. Lewis* was the adminstrator *de bonis non* of *James*, and had no assets. Upon a bill against all these parties, the accounts of

the several estates, and of the Plaintiff's legacy, were taken and confirmed, and a decree made, declaring what was due to the Plaintiff, and that there were no assets in the hands of *Thomas Yarborough* and *Lewis*. The Plaintiff sought satisfaction out of the real estate of *Henry* and *James Yarborough*; and to obtain it, issued the present *scire facias* against their respective heirs and devisees.

RUFFIN, Judge, after stating the case as above, proceeded: I conceive, that the Plaintiff cannot proceed in this manner. That Equity will subject the lands to the ancestor's debts is perfectly clear. It is one of its oldest jurisdictions to grant discovery, and take accounts of the real estate. It does it as ancillary to Courts of Law, for the satisfaction of mere legal demands. Much more will it do so when the debt, due by its own decree, is entitled to satisfaction out of the lands, as is the case with all debts in this State. But when a person resorts to a Court of Equity for relief, he must adopt the mode of proceeding known to that Court. The regular course of this Court is to proceed upon English bill, and the answer or plea of the Defendant, upon oath. The *sci. fa.* is a process unknown to it, as a Court of Equity, unless in a few cases provided for by statute. It is a strictly common law writ. Our act of Assembly gives it in the case of the death of a party in Equity, instead of the bill of revivor. But it can be used only to revive. If any new matter is to be put in issue, or becomes material to the just decision of the cause, it must be introduced by bill, in the nature of a bill of revivor and supplemental bill.

It would be impossible for this Court to administer its justice in this method. Why shall the attempt be made? It is said, because it is more simple and expeditious. I think quite the contrary. The pleadings in Equity are much less technical than at Common Law, and leave a cause more open for a decision upon its merits. The expedition will only exist in cases not disputed. But we

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have a right to expect cases of real litigation, in which the heirs will deny the full administration, or insolvency of the executor: others, as here, where there is a primary and a secondary liability. How are these questions to be tried? If under this process, by a jury. We know that one of the most expensive, difficult and dangerous proceedings at Law, is the trial of the issue of *plene administravit*. Often the parties have to come into this Court for assistance by way of discovery, before trial at Law, or relief from the injustice done by the verdict on that issue. The witnesses must all be present at once before the jury. Every voucher must be *then* proved by a disinterested witness; and the parties cannot be called on for admissions. These reasons have raised the jurisdiction here; because accounts can be taken more correctly, at less expense, and more speedily. Should we proceed upon *sci. fa.* until the jury had found a verdict, and then entertain a bill to correct our own injustice, as we do that of a Court of Law? At Law, judgments are always direct and immediate, although, as between some of the parties liable, there may be, in Equity, an immediate and more remote liability. In pursuing this legal method, should we not be obliged to adopt the legal measure of justice? Now it is plainly inequitable, that the heirs of *James* should pay the Plaintiff, unless they be able to get satisfaction from the heirs of *Henry*; because the latter received the assets of the former. Yet at Law, there is no such thing as successive liability. A judgment is always direct. If we are to retain our own rule of decision, why not our own method of arriving at it, since it has the sanction of ages, is thoroughly settled, and well understood. I will mention several other inconveniences of a change. It is the rule of this Court, that each party pays his own witnesses, without regard to the event of the cause. This would be ruinous in practice, upon a collateral issue between the heir and executor. It is another rule of this Court, that no suitor shall

be concluded by one hearing; but that by by petition or bill of review, every material point of the decree may be reconsidered, and solemnly decided twice. The introduction of the jury trial abrogates this part of the course of the Court, as applied to this class of controversies; and as the case is not on paper, many of the most intricate questions, both of law and fact, must go off as at *nisi prius*, where the case is given to the jury *viva voce*; or be re-examined at the expense of a new trial, as at Law. The extreme difficulty of doing justice, in a trial at Law of such cases, pressed itself on the attention of the Legislature so strongly, as to produce the passage of an act, authorizing Courts of Law to refer, as to a Master, matters of account of this kind. I allude to suits on the bonds of guardians and administrators. Surely then, this Court, when it may safely act in its ancient and accustomed mode, ought not to yield up its distinguishing characteristic, which constitutes its real value to the country; and adopt that of the Common Law, the inadequacy of which to the ends of justice created this jurisdiction, and continues its existence.

I have supposed, that the facts put in issue upon this legal writ are to be tried by a jury. If this be not so, but the defences are to be made and the facts ascertained, according to the course of this Court, by plea and answer on oath, and reference to the Master, then plainly there is no saving of time or expense, or any change but that of substituting a *sci. fa.* for a bill, as the means of instituting the suit against the heir. Why do that? What advantageth it? I object to a change that is to do no good, unless required by a law. I object to it also, because it is an indirect method of giving this Court original jurisdiction, not contemplated by the Legislature. I admit we must do it, if the Legislature so enacts. It is to be hoped it never will. I think it never has.—The act of 1784 (*Rev. c.* 226) is expressly confined to "suits at law;" and the defences are all legal, and to

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be tried according to the course of the common law. The act of 1807 (*Rev. c.* 716,) is plainly *in pari materia*, and confined also to suits at Law. And the express declaration in the last section is, that the provisions in that act shall not affect the *remedy*, which any creditor has *in Equity* against the real estate of a deceased debtor, or in any manner change *rules of decision in Equity* in any such case. The second section of the act of 1787 (*Rev. c.* 278) has been urged as giving this remedy. After reciting, that the mode of carrying into effect decrees in Chancery was by process *in personam*, it enacts that upon decrees for sums of money, the party may issue execution against the Defendant's body or estate, and that the estate shall be bound in the same manner, as it is by judgment and executions at Law. I take this to mean simply, that there shall be execution in Equity, and to declare its *lien*—what shall be bound and sold under it. But it does not profess to prescribe a method, by which the decree may originally be had; nor by which, after obtaining it against one person, you may execute it against another. But if there were a doubt upon this, it is removed by the cautious proviso of the subsequent act of 1807.

I am confident, that the justice of this Court can only be administered by adhering to the mode of proceeding, which is peculiar to it: and I must oppose as strenuously innovations upon it, as upon that of the common law. Each is best in its appropriate sphere. I think this writ must be quashed; and the Plaintiff put to his bill.

HENDERSON, Chief Justice, *dissentiente*.—I do not concur in the opinion, that the *scire facias* should be quashed. And the process of reasoning, by which I arrive at the opposite conclusion, is very simple, and to me very conclusive. But I say this with great deference. By the act of 1784 (*Rev. c.* 226) after reciting

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that doubts were entertained, whether the real estate of deceased debtors, in the hands of their heirs or devisees, should be subject to the payment of debts upon judgments, against the executors or administrators, in order to remove such doubts, it was enacted (in the second section) that in all suits *at Law*, wherein the executors or administrators of any deceased person shall plead *fully administered—no assets*, or not sufficient assets to satisfy the Plaintiff's demand, and such plea shall be found in favor of the Defendant, the Plaintiff may proceed to ascertain the demand, and sign judgment. But before taking out execution against the real estate of the deceased debtor, a writ or writs of *scire facias* shall issue, summoning the respective heirs and devisees of such deceased debtor, to show cause why execution should not issue against the real estate of such deceased debtor, for the amount of such judgment. And if judgment shall pass against the heirs or devisees, execution shall and may issue against the real estate of such debtor, in the hands of such heirs and devisees. The third and fourth sections are on subjects foreign to this point. The fifth section gives the heir or devisee the right of contesting the plea of fully administered, though found for the executor or administrator, on the trial between the creditor and executor or administrator; and points out the manner of making up the issue, and the course to be pursued if *found* for the heir or devisee. Another act, that of 1807 (*Rev. c.* 716) points out what is to be done, when there are really no assets, and an insolvent executor or administrator omits or refuses to plead fully administered.

It is to be observed, that in this act, the personal representative is to contest the creditor's right of recovery. When that right had been settled in contest between him and the creditor, and in favor of the creditor, that question is put to rest as to all persons, whether heirs or de-

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visees, who have the dead man's land (saving, I presume, recoveries effected by a fraudulent combination between the creditor and executor or administrator). The only question to be tried and investigated, when the heir or devisee is called on, is that of the administration of the personal assets. For although the heir or devisee is bound, as to the question, debt or no debt, and all other questions arising in the cause, the Legislature did not conclude them as to that point, but permitted them to contest it with the executor or administrator, as a cause, not why judgment should not be rendered against them *for the debt*, but why execution should not issue, *not against them*, but against the lands and tenements of the deceased debtor in their hands. The debt, except in cases of fraud, is conclusively fixed on the estate, by the trial between the creditor and executor or administrator. The heirs' or devisees' only defence is, not against a judgment against them, for none is prayed; nor against an execution against them, for none is prayed: I say, their only defence against an execution to sell the land in their hands is, that there is, or was a sufficiency of personal estate to satisfy the debt. It is admitted, that this act did not give a *sci. fa.* upon a decree in the Court of Equity; its words are confined to judgments at Law. At that time, Courts of Equity enforced their decrees by other process, and could not issue either a *fieri facias*, or *capias ad satisfaciendum*. But the Courts of Equity were authorized and directed to issue these writs by a subsequent act. By the act of 1787 (*Rev. c.* 278, *s.* 2) it was declared, that the mode of proceeding then used to carry into effect the decrees of a Court of Equity, by attachments, *habeas corpus* attachment with proclamations, and commissions of rebellion, are in many cases dilatory, oppressive and inadequate, and it was enacted, that in all cases, where decrees might have been made in any suit in Equity, in any of the Courts of this State, or should hereafter be made, for any sum or sums of money

it should be lawful for execution to issue against the Defendant's body, or against his goods and chattels, *lands and tenements*, to satisfy such decree and costs (and the goods and chattels, lands and tenements, shall be bound by such decree and execution, in the same manner as goods and chattels, lands and tenements, are bound by judgments and executions at Law) *in the same manner as executions shall issue in the Courts of Law*. This act gives the same execution on decrees to pay money, as are given at Law. If so, execution shall issue against the lands and tenements of the deceased debtor; for it did so, at Law. But a *scire facias* shall first issue to the heirs or devisees, to show cause why such execution shall not issue. Without this exposition of this act, the same remedy is not given to enforce decrees in Equity, as is given to enforce judgments at Law. The lands of the debtor were liable, by an old statute passed in the reign of *George II.* Our Court Law enforced the same right. It gave the *fieri facias* against lands and tenements. The act of 1784 declares it to be doubtful, whether execution should issue against the lands and tenements of deceased debtors in the hands of the heirs or devisees, and that in certain cases it shall, and directs that a *scire facias* shall first issue to the heirs or devisees, and points out what grounds they may take, to protect the lands in their hands from the execution, on the judgment against the executor or administrator. The act of 1787 gave such execution on decrees of the Court of Equity for money, against the goods and chattels, lands and tenements of the debtor, as was given by law; that is, by prior acts. The act of *George II.* and our act of 1777 (*Rev. c.* 115) gave it against the lands of the debtor, and the act of 1784 cleared away the doubt, whether execution should issue against the lands, in the hands of the heirs or devisees, in certain cases, but prescribes that a notice or *scire facias* shall first issue to them, to show cause against

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it. If the act of 1787 only extended the act of *Geo. II.* and the act of 1777, as to Equity decrees, then the same doubt would exist which existed prior to the act of 1784, and we would have now to debate, whether lands in the hands of the heir or devisee could be sold under a decree against the executor or administrator. I think no such doubt exists. The execution against the lands is given upon a decree, as it is at Law, explained as it is by the act of 1784. I enter not into the discussion, which is the easiest and most convenient mode, by bill or by *scire facias*. That rests with the present Plaintiffs. And as to a bill being more congenial to Equity rules and Equity practice, that was a question for the Legislature. But I confess I agree, both with the Plaintiffs and the Legislature, that a *scire facias* is the most easy and convenient. The only question which can arise in the *scire facias*, viz. the administration of the personal assets, does not require the modes prescribed in the Court of Chancery by English bill. As to the questions of prior and posterior liabilities, that is settled by the decree. When they arise, it will be more proper to examine into it. But the creditor, having obtained his decree against the executor of his debtor, asks for an execution against his debtor's land, and calls on the heirs and devisees to show cause, if any they have, why he should not have it. As to the argument, that this Court is better qualified to examine the administration of the personal assets, than a Court of Law, if that fact is put in issue, we will examine the fact our own way. If a bill was brought to carry the decree into execution; if that be the only way, and resorted to from necessity, and not from choice, I suppose, since the act of 1787, no defence could be made, except that given by the act of 1784, to the heirs and devisees on the *scire facias*. If the bill be not the only remedy, but resorted to through choice, Equity might say you have no merits, from some cause peculiar to the Plaintiffs, and refuse to move.

In addition to all this, I believe, the practice since 1787 has been to proceed, in similar cases, by *scire facias*.

The argument, when summed up, is this: The act of *Geo. II.* and our act of 1777 gave the *fi. fa.* against the lands of the debtor in his own hands. The act of 1784 gave the *fi. fa.* against the lands of a deceased debtor in the hands of his heir or devisee, upon a judgment against his executor or administrator, in certain cases; but prescribed a *scire facias* against the heirs and devisees. When these acts were passed, no process to sell property, or against property, issued to satisfy decrees in the Court of Equity. The process was *in personam*. The act of 1787 declares, that where there shall be any decree for money in a Court of Equity, that *execution may issue thereon against the Defendant's body, or against his goods and chattels, lands and tenements, to satisfy such decree, in the same manner as executions shall or may issue in the Courts of Law.*

It follows, that as by the statutes of *Geo. II.* and of 1777, execution might issue against the lands of the debtor in his own hands, to satisfy a judgment at Law, so an execution might issue against the lands of the debtor in his own hands, to satisfy a decree in the Court of Equity. For by the act of 1787, execution shall issue, in the same manner as in the Courts of Law. And as by the act of 1784, execution may issue against the lands of the deceased debtor in the hands of the heir or devisee, to satisfy a judgment obtained against an executor or administrator in certain cases, so in like cases an execution may issue against the lands of the deceased debtor, in the hands of his heir or devisee, to satisfy a decree of a Court of Equity, against the executor or administrator. For, as was said before, the act of 1787 declares, that execution may issue thereon (decrees in a Court of Equity) against the Defendant's lands to satisfy such decree, in the same manner as such executions may issue in the Courts of Law. The act of 1784 prescribes the *sci.*

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fa. to the heirs and devisees, upon a judgment at Law against an executor or administrator. It must be founded in a similar case on a decree in Equity; for execution is to issue in the same manner as in a Court of Law. The same argument, which would prove that a *fi. fa.* could not issue against the lands of a deceased debtor, in the hands of his heir or devisee, upon a decree for money, would prove, that a *fi. fa.* could not issue against the lands of the debtor in his own hands, upon a similar decree against him.

I very much regret this difference of opinion, but entertaining doubts, I could not do otherwise than express mine.

PER CURIAM.—Let the *scire facias* be quashed.

Edmund D. McNair, adm'r of Ebenezer McNair,
v
Thomas Ragland et al. adm'rs of Richard Kennon,
} From Chatham.

A debt existing before the depreciation in the currency, which took place in the revolutionary war, might have been discharged in that currency. But if not paid or tendered during that period, upon the subsequent resumption of cash payments, the whole sum is to be paid, without reference to the depreciation.

A debt contracted while the currency was depreciated, upon the resumption of cash payments, must be discharged according to the rate of the depreciation at the date of the contract.

But an agent, charged with the collection of debts, is responsible only for what he collects; and if he received a debt in the depreciated currency, upon a settlement made after the resumption of cash payments, is to account only for the value of the currency at the time it was received.

And where a collecting partner owed a debt to the copartnership, contracted before the revolutionary war; and also collected money due to the copartnership during the depreciation of the currency, upon

a settlement of his accounts, allowance was made for the depreciation upon money collected, but not upon the debt due from himself.

A debtor is liable to pay interest, by virtue of his contract, whether he made it or not. An agent, or trustee, is liable, only because he made it, or might have made it but for gross neglect. As where a collecting partner, in obedience to the confiscation acts, *bona fide* paid the share of his alien partner into the treasury, it was *held*, that whatever may be the effect of the treaty upon such payment of the principal debt, the collecting partner was not liable for interest thereon.

The treaty of 1783 revived the rights of British creditors, and restored them the right to sue, as if the confiscation acts had not been passed. The war of 1812, there being no new confiscation acts, did not affect those rights, otherwise than to suspend the right of suing.

Whatever may be the effect of the treaty of 1783 upon the mutual rights of copartners, where the whole partnership property, or a portion of it, belonging to an alien partner, was seized under the confiscation laws, yet where the copartnership owed the alien partners for advances, the resident partner's share of these advances constituted, in Equity, a debt, which he owed his copartners, and which is within the treaty.

One of several administrators, who assents to the delivery, by his co-administrator, of the assets to the next of kin, before the payment of debts, is guilty of a *devastavit*. So also, if the assets were delivered over in obedience to the decree of a Court, unless he shows that it was made *in invitum*.

The original bill was filed in 1800, by *Ebenezer McNair* in his own right, and as the executor of *Ralph McNair*, deceased, against the Defendants, as the administrator, of *Richard Kennon*, deceased; having abated, it was revived by the present Plaintiff, who is the administrator *de bonis non* of *Ralph*, and the administrator of *Ebenezer McNair*. It charged that in August, 1771, a co-partnership was entered into by articles under seal, and set forth in the bill, between said *Richard* and *Ralph*, by which another partner might be admitted by the latter: and that accordingly, the said *Ebenezer* was admitted: that the business was pursued until August, 1774, when it was dissolved; and that *Kennon* had possession of the books and effects to close the concern, as by the articles

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he was bound, and did proceed therein, until 10th April, 1777; when a balance account of the state of the concern was made up, signed and delivered by *Kennon* to the other partners, who adhered to the enemy, and were about leaving, and did shortly thereafter leave this country. The bill charged, that *Ebenezer McNair* was admitted a partner, as a member of the firm of *Ralph* and *Ebenezer McNair* of Hillsborough, that is, *Ralph* two sixths and *Ebenezer* one sixth. A copy of the balance account was exhibited with the bill; by which it appeared, that the funds of the firm then outstanding, or in *Kennon's* hands, were of the value of £3069 0 10. And the firm owed a debt to the firm of *Ralph & Ebenezer McNair*, for goods furnished to *Richard Kennon & Co.* of £1853 5 3, and that the profit then apparent was the sum of £1215 15 7, whereof one half was *Kennon's*; the sum of £405 5 2 was *Ralph's*, and the sum of £202 12 7 was *Ebenezer's*. It was admitted, that by a payment the debt was reduced to £1701 15 2, on the 1st of July, 1777. It was charged, that *Kennon* collected the whole effects, and died in 1794 intestate; and that the Defendants jointly administered on his estate, and received his assets sufficient to discharge the Plaintiff's demand. The death of *Ralph* was then charged, and that *Ebenezer* was his executor. And the bill prayed an account of the copartnership, and payment of all sums due. It was not stated when *Ralph* died, nor when *Ebenezer* returned to this country.

To this bill the Defendants originally put in a plea of an account stated on the 10th of April, 1777, and relied on the statute of limitations from that time. This plea was overruled in 1819. It specified the precise sums stated in the account exhibited in the bill, and that it was of the same date.

Upon the overruling of the plea, the Defendant, *Ragland*, alone answered. The material parts of the answer were, that a copartnership between *Kennon* and *Ralph* was admitted; but not the particular articles, nor *Ebe-*

nezer's participation, nor his executorship. It contained no account of the partnership, and averred, that the few papers which *Kennon* left concerning it, were taken by the Defendant, *Hines*, who had removed to Georgia, and that he, *Ragland*, was unable to render any account. He denied, that he had any of *Kennon's* assets, and said that the administratrix and the other administrator took the whole; that he never interfered, further than to join in the inventory, and aid in making sales, and that the others received the bonds, and collected the money on them. He then stated, that pending this suit, by some proceeding in Chatham County Court, a division of the negroes and other parts of the estate, was made amongst *Kennon's* children, to whom the whole was delivered. He did not set forth what agency he had therein, nor whether he assented or objected thereto. The answer further alleged, that *Kennon*, in April, 1781, paid into the treasury the sum of £1941 3 2, under the confiscation acts, and claimed a credit therefor against both *Ralph* and *Ebenezer*.

The bill was taken *pro confesso*, as to the other Defendants.

Upon the case thus made, a reference was ordered, and the Master made a report, in which he submitted several points for the decision of the Court. Besides those, others were made by exceptions on the part of the Defendants.

The Master charged *Kennon* to *R. & E. MacNair*, with the sums of £1701 15 2 (the balance due for merchandize or stock) and £607 17 9, their shares of the profits, *as a debt* due from *Kennon* to them on the 1st of July, 1777. He gave him credit for £160 10 11, being one half of the debts to the firm not collected, and found a balance of £2125 2 0, on which he charged interest from the 4th of July, 1782, to the taking of the account. He stated the account in the present currency, viz. at ten shillings to the dollar. He did not credit *Kennon*

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with the sum of £1941 3 4, said to be paid into the treasury; but stated that the Defendant produced the receipt of *Matthew Jones*, Treasurer, therefor, without finding whether the payment was actually made, or what was *Jones'* official character. The receipt itself was expressed to be, "in part of *Ralph & Ebenezer MacNair's* "confiscated property."

The Master submitted, first, whether the sum due to the Plaintiff, was to be computed at eight or ten shillings to the dollar; secondly, whether the depreciation of the paper money, in which *Kennon* probably collected the debts, was to be allowed; and thirdly, whether *Kennon* was entitled to a credit for the money paid to *Jones*. The Defendant excepted to the charge of interest before the filing of the bill; and likewise to the charging *Kennon* with the effects of *the firm*, as so much money in his hands on July 1st, 1777.

The books of the firm were produced, and upon inspection, appeared to have been regularly and fairly kept by *Kennon*, up to the time of his death. In them a *cash account* appeared balanced monthly; and the several periods of receiving the money, from whom received, and how invested, are also stated. Likewise the account of *R. & E. MacNair*, in which the item of £1941 3 4, is charged to them, corresponding with *Jones's* receipt.

Winston, for the Defendant, insisted, 1st, that altho' the administrator joined in the inventory, this did not create a presumption of assets, and cited *Wesley* v. *Clarke* (1 *P. Wms.* 83, *n.*) *Scurfield* v. *Howes*, (3 *Bro. C. C.* 90.) *Langford* v. *Gascoigne*, (11 *Ves.* 333.) *Hovey* v. *Blakeman*, (4 *Ves.* 596.) *Bacon* v. *Bacon*, (5 *Ves.* 331.) *Mangrum* v. *Sims*, (1 *Law Rep.* 547.) *Gordon* v. *Neely*, (3 *Hawks* 239.) *Hutson* v. *Hutson*, (1 *Atk.* 400.) 2nd. The receipt of the treasurer and confiscation acts furnish a sufficient defence. (*Vattell* 372, *Book.* 3 *ch.* 10 *s.* 375.—*Book* 4 *ch.* 2 *s.* 20, 23.) If the treaty of peace did

suspend the operation of the act of 1779, that treaty was abrogated by the war of 1812. *Den ex dem. of Cunnigham* v. *Michel* (*Con. R.* 77.) *Ray* v. *McCulloh*, (*Con. R.* 492—11 *sec. of Act of* 1779 *Rev. c.* 153.)

Seawell and *Gaston*, with whom was *Badger*, for the Plaintiffs, cited *Sadler* v. *Hobbs*, (2 *Bro. C. C.* 117.) *Chambers* v. *Minchin*, (7 *Ves.* 186—2 *Fonb.* 180, 181.) *Underwood* v. *Stevens*, (1 *Mer.* 712.) *Shipbrook* v. *Hinchinbrook*, (16 *Ves.* 478.) *Leigh* v. *Barry*, (3 *Atk.* 582.) *Hamilton* v. *Eaton*, (*Martin's Rep.* 75.)

Upon the question of interest—*Franklin* v. *Frith*, (3 *Bro. C. C.* 433.) *Willis* v. *Commissioners*, (5 *East* 35.) *Dunscomb* v. *Dunscomb*, (1 *Johns. C. R.* 510.) *Manning* v. *Manning*, (1 *Johns C. R.* 527.) *Schieffelin* v. *Stewart*, (1 *Johns C. R.* 624.)

Nash, in reply, cited *Hovey* v. *Blakeman*, (4 *Ves.* 604.) *Walker* v. *Symonds*, (3 *Swanst.* 64.) *Bacon* v. *Bacon*, (5 *Ves.* 304.) *Balchen* v. *Scott*, (2 *Ves. Jr.* 678—*Shepperd's Touchstone—Toller* 430.) *Higgins* v. *Crawford*, (2 *Ves. Jr.* 571—1 *Starke* 32—1 *Kent's Com.* 165—*Martin's Law of Nations* 55.) *Governor* v. *Howard*, (1 *Mur.* 465.) *Knight* v. *Reese*, (2 *Dal.* 182.)

RUFFIN, Judge, after stating the case as above, proceeded: Upon these facts and the points submitted, several questions of law have been raised, some of which are of real difficulty; on which able and full arguments have been made at the bar. Others have not been so fully discussed, as the Court, in considering the case, think they merit; and therefore, a further opportunity will be afforded for such additional investigation, as their importance to the parties seems to call for. The Court however, will proceed now to decide most of the questions involved, in order that the future attention of the Counsel and the Court may be confined to as few points as possible.

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Undoubtedly, the pound, during the time this copartnership did business, was computed at $2 50. Their dealings were at that rate. At the time the state of the concern was taken, that is, the 10th of April, 1777, the dollar had depreciated to one and a half for one. But if *Kennon* was *debtor* to the Plaintiff before that day, and then ascertained the balance, but did not pay it, he cannot avail himself of the depreciation. If he had then tendered the money, the creditor must have received it, depreciated as it was. And if he had contracted a debt at that day, its value must have been estimated, after the resumption of payment in *specie*, as of the time of contracting the debt. But as these were previous transactions; if they be regarded as creating a debt from *Kennon* to the Plaintiff, the depreciation does not affect them, since they have not been paid before the depreciation ceased. It must now be paid in dollars at eight shillings, and not at twelve shillings.

But although such be the rule in relation to *debts*, and must be applied to the present demand, as far as any part of it shall be found *debt*, properly speaking; yet in relation to the firm, *Kennon* did not stand as debtor, but as acting partner and trustee. Immediately after April, 1777, the paper money depreciated rapidly, and continued to do so, until it reached eight hundred for one in 1782. In collecting the debts, *Kennon* did not make himself chargeable with good money for bad. He is only charged with what he received, or with converting what he received. He stands in this respect, precisely as any other agent, whom all of the partners had appointed. Such an agent would have been liable to pay to each partner his share of the effects, actually collected. If they turned out, by the depreciation, to be of no value, then there would have been a total loss of the copartnership effects; and when the copartners came to settle among themselves, their demands against each other would have been adjusted, on the footing of a total loss. In ascer-

taining the final profit or loss of the business, then, the depreciation of the money must be taken into account. The profit apparent upon the balance account of April 10, 1777, is not a real, ascertained profit. The business was not then closed. The profits might have been subsquently increased by interest, purchases of land in payment of debts, or other means. They might have been altogether sunk in insolvencies of debtors, or destruction of property during the war, or in the depreciation of money, at the time it was received or afterwards. This loss is not to be thrown entirely on the collecting hand. If *Kennon* were now living, he might and would be required to state in what funds the payments were actually made. The parties are at liberty now to prove, if possible, that fact. Some of the debtors may be living. Some of *Kennon's* receipts may be found, expressing specie payments. Some deeds for land belonging to the firm may be traced, in which the consideration will exhibit the truth. The money actually received is that with which he is chargeable. But in the absence of all evidence, the history of the times, as well as the scale of depreciation, fixed by law in 1783, must guide us. The books show the periods of receiving the money, and its value must be determined by that. There is no other mode, at this remote day, of arriving as nearly at the truth. And the Court feels the less reluctance in relying on *Kennon's* entries for this purpose, because, on looking into the books, it is obvious, that he meditated no advantage of his absent partners, but in good faith kept the accounts, and protected their interests, as far as he could, or thought himself justified. He refrained until 1781 (probably as long as he was allowed) to submit their share to the operation of the confiscation acts. He then charges just the sum paid to their individual account. He afterwards kept that account open, and continued his cash account, and made several entries in it. Had he lived, unquestionably this controversy would not have arisen—at least

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by his fault, if we are to judge by the acts of his life. The depreciation is therefore proper to be allowed, in ascertaining the value of the partnership effects, which came to *Kennon's* hands.

The charge of interest would be properly made, if this were a debt, and if it be a debt not affected by confiscation. But at present, it is not material to consider the latter point; because clearly, for the reasons already given, *Kennon* was not a debtor, at least to the extent of the partnership funds left his hands. It is repeated that he was a trustee. He is therefore chargeable with interest only in two cases: first, if he made it; secondly, if he was in duty bound to make it, might have made it, and did not. As far as the debts increased by interest before collection, that attached itself to the principal, and became principal in his hands. But if it be apparent, that a trustee did not make interest, and could not; that he was prevented by law from doing so; that the effects were seized out of his hands, he is not upon general principles chargeable with interest. A debtor is obliged to pay interest, because it is a part of his stipulation. Whether he makes it or not; whether he has the money in his desk or not; whether he lays it out in funds bearing interest or not; neither charges him, nor discharges him. His contract obliges him. An agent or trustee stands upon a different footing. He is liable *prima facie* for interest made, or for grossly neglecting to make it. If therefore *Kennon* did in fact pay into the treasury funds in his hands *bona fide*, he is not liable for interest, *as a partner*, until the bill filed. He is not chargeable for unfaithfulness, where he was not unfaithful. The Court holds this position, altho' the treaty of 1783 should operate upon that part of the demand, which is principal money. That treaty may include a trust fund, like that in dispute. Its obvious import respects debts. But for the present, the Court does not mean to determine, whether in its extent, it is broad enough to render one copartner personally liable

to another, for the share of the latter, seized out of the hands of the former by the sovereign. Be that as it may, it cannot have the effect of turning an agent into a debtor, and compelling him to pay interest; nor the obedience to the law by a trustee acting *bona fide*, into a breach of trust rendering him liable for consequent damage. The opinion of the Court, on this point does not rest on the strength of confiscation acts, as confiscations; whereby *Kennon* is discharged from a demand to which he would be otherwise liable. On the contrary, he was never liable for interest; because he did not contract, as a debtor, to pay it; and because, as trustee, he did not make it, and could not make it.

The effect, upon the principal sum itself, of the payment into the treasury, depends upon the construction of the treaty of peace with Great Britain. Whatever doubts were once entertained upon the operation of that instrument, its construction and obligation have been so long settled by the Courts of the Union, and acknowledged by the citizens and Courts of North Carolina, in reference to *debts*, that this Court could not suffer an argument against it. The Counsel for the Defendant have, very ingeniously, put their case upon a new point, as regards the treaty. They argue, that the war of 1812 annulled the treaty; that the operation of the confiscation acts was prevented by the treaty alone; and that upon the expiration of the latter, the former revived. If the treaty were to be regarded in the light of a repealing statute, and the war a repeal of that, the argument would be fair, and the conclusion sound. But the similitude does not exist. The reason why the repeal of a repealing statute revives the law first repealed is, that it necessarily denotes the intent of the Legislature, that such shall be the case. There can be no other motive for the repeal of a repealing statute. That has no application to the case of the law and the treaty under

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consideration. If the war had been declared by this State alone, such an inference could not be drawn. Much less, when it was the act of another government, having no power over our State laws. But why suppose, that the confiscation acts of the revolution were intended to be revived by the war, when no new confiscations were enacted. The persons formerly offending had most of them, been long in their graves; and it is not to be supposed, that the hard measure of seizing private property, tho' enemies', was intended thus indirectly to be effected. The treaty revived the rights of the British creditors, and gave them as full force, as if the confiscation acts had never passed. It abrogated those acts altogether, and left those rights as those of other friendly aliens. Upon the breaking out of a new war, they depended upon the general doctrine respecting debts to alien enemies. They were not forfeited. There was a temporary disability to sue, which ceased with the war. But even that does not appear to be the case here; for *Ebenezer McNair* states himself in the bill to be *then* of the city of Richmond in Virginia. Upon the general question, however, the Court is clear, that the confiscation acts, as continuing laws, do not bar the Plaintiff; not because the treaty remains in force, notwithstanding the late war; but because rights arose under the treaty while it was in force, which nothing that has been since done has destroyed, or was intended to destroy.

What effect this shall have upon the present controversy in all its parts, the Court will not now conclusively determine. Whether *Kennon* shall stand charged with or excused from the £607 17 9, stated to be *profit*, or whatever other sum may, upon taking the accounts, be found to be the profit, the Court reserves to be further considered. It may be, that as far as the profit goes, or as far as the *McNairs* were interested, *as partners*, in the firm, the confiscation and seizure may be a specific destruction of the trust fund; and that the treaty gives no right to

them to seek reparation from their copartner. It might be, if the stock of the partners, as well as their profits, had been equal, that the confiscation might have exonerated *Kennon* altogether. Or it may be, as a part of the Plaintiff's demand is for supplies furnished the store, that *Kennon* must himself indirectly sustain a part of the burden of the confiscation, by considering the loss of the *McNairs* the general loss. It may be material, too, to consider, that the payment to the public, if made at all, is said to be on account of the confiscated estates of *R. & E. McNair*, when the act of 1779 mentions *Ralph* alone. That is an office found as to him; but even if *Ebenezer* comes within the provisions of the general previous act, a further office must be shown as to him. And then the effect of that, whether the loss shall fall on all or on each separately, will remain to be determined. I am now speaking in reference to the partnership effects being in *Kennon's* hands, as the acting partner and trustee for the firm. And the Court declines declaring the rights of the parties; because the points were not discussed at the bar, and perhaps the cause may be decided yet, without the Counsel considering it worth while to enter into that discussion. But all equity on these points is reserved; and in taking the future accounts, the parties are at liberty to have any matter stated, which will raise the questions.

But whatever may be the rule, regarding *Kennon* as a trustee of the fund, it can have no application to a large, and indeed the most important part of the Plaintiff's demand. *Ralph & Ebenezer McNair* were *creditors* of *Richard Kennon & Co.* in the sum of £1701 15 2; for one half of which *Richard Kennon* was personally their debtor, in the event even of a loss of all the profits, and of a total loss of the whole capital—from whatever cause such losses might arise. It is true, they could not sue him at Law; nor could they in Equity, as for a specific sum, unconnected with the other transactions of the

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house, because *Kennon* might, in like manner, be a creditor of the concern. But here, the parties have, in fact, so far adjusted the partnership, as to show what the firm owed to one partner, and what the other partner owed to the firm. They found the *McNairs* creditors, to the amount before mentioned; and they found *Kennon* a debtor to the firm in the sum of £73 9 7. It remained only to close the concern, so that it might appear, what final profit or loss might be made. If a profit, then the *McNairs* would receive their whole *debt*, and a share of the profit: if a loss, the *McNairs* would receive such a portion of their debt, as the joint property could satisfy; and if the residue, one half must be borne by themselves, and the other half paid to them by their partners. In the most adverse event, therefore, *Kennon* is a *debtor*, not to the firm, but to *R. & E. McNair*, in one half of their advance of £1701 15 4, after deducting therefrom his own debt to the firm of £73 9 7, of which last sum he ought to pay to them the whole with interest, deducting that for the war. It may be said, that this money was also in his hands as a part of the trust fund. It is admitted. But it was a trust for his own benefit, as well as theirs; and if the fund be lost, he remains a debtor *to them* for a share of their advance over and above his. And however the confiscation, but for the treaty, might have protected him from that (as indeed it would from any other debt) yet the effect of his fiduciary character cannot be carried so far, as to evade the treaty, as respects the debt due from himself. To this extent, he was strictly a debtor. For by the articles, no particular stock is to be provided by either party. *McNair* was to import the goods, and put them to the firm at a very low advance, and *Kennon* was to sell them, being allowed at first a salary for his time out of the profits, and each to share equally in gain or loss. Afterwards his salary was given up, in consideration of the services to himself of the store-keeper paid by the company. The debt to

McNair, therefore, is for goods, and stands on the same footing with a purchase from another person. To this extent, at all events, *Kennon's* estate is immediately liable to the Plaintiff. It will be to a greater, if, upon taking the accounts, a profit shall still be found, or less than a total loss; because *McNair* is entitled to full payment out of the fund, as far as it goes; and when that fails, to call upon *Kennon* for half the deficiency. The Master reports sundry small payments for *McNair*, which the Court will not now consider, but leave to be adjusted by an accurate account. In the mean time, as it is certain that the aggregate of principal and interest thus due must exceed the sum of $6000, a decree must be pronounced therefor presently for the Plaintiff, and another reference to the Clerk, to state the precise sum due on this part of the case. If the Plaintiff be satisfied therewith, no further accounts need be taken; but if he should desire it, the Master must take a full account of the partnership, to ascertain what the loss or gain was, and adjust it between the copartners. The Court does not think it necessary to distinguish in their opinion, the share of *Ralph McNair* from that of *Ebenezer*, in the sum now decreed; because the whole is for a debt due to the house of *Ralph & Ebenezer McNair*, and the distribution between themselves will be made in the settlement of that house, which is not now before us.

The question of the liability of the Defendant, *Ragland*, is then submitted by the Clerk, and has been elaborately and ably argued at the bar. The Court does not feel it necessary, to enter upon the general doctrine of the liability of one trustee, or executor, for the act of another; nor to say, whether that of co-administrators is distinguishable from one or both of them. The facts are but imperfectly reported; and the Court does not choose to lay downany general rule upon the effect of joining in an inventory, or joining in a sale or hiring. But the Master reports, that in 1802, there were twenty seven slaves, of the

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value of $200 each, and the Defendant seeks to exonerate himself from answering for their value, by saying that they were divided by order of Chatham County Court, since the filing of the original bill, and while it was pending, amongst his intestate's next of kin, and that accounts of the estate were taken upon a petition in that Court, upon which balances were found due, decreed and paid to the next of kin: but he has laid none of these proceedings before the Master. These facts furnish the specific ground upon which the Court hold, that the Defendant, *Ragland*, is chargeable. Delivering over assets to legatees is a *devastavit* as to creditors. It is true, one executor may assent to a legacy, and therefore probably his assent might not charge a co-executor. But one administrator cannot divide the estate, without the assent of the other. And if administrators are to be placed within the rule of trustees, it is clear that by that rule, if one assents to a disposition of property, wrongful in itself, and not only made that the other trustee might misapply the proceeds, but constituting, in the very act itself, a misapplication, it is a breach of trust, and renders the party responsible. If this division had been made out of Court, there could be no doubt of this consequence. It was a direct concurrence in a *devastavit*. Nor is it less so, when made under decree, unless he shows by the proceedings that he resisted it. For ought we can know, he assented to it expressly, joined in taking the accounts, received commissions, and participated in making the actual division under the decree. The withholding of the record creates every presumption against him. If he was not a party to it, he had it completely in his power to protect himself and the creditors, by taking the property into his possession, or suing for it. If he was a party, then he must be taken as assenting, unless he shows the contrary, and that his efforts were real, and to the utmost of his power. It is to be recollected, that all the proceedings were had whilst the present suit was in pro-

gress, and after the Defendants therefore had complete notice of the demand. A creditor must not thus be defeated; but each person contributing to the attempt must answer to him. He is not hereby charged beyond the value of the specific slaves, thus delivered over. When the Plaintiff shall attempt to carry it further, the Court will act upon the case, as it may then be made to appear. At present, it is not necessary to lay down any general rule.

As the Master has taken no account of the partnership, and has proceeded upon a wrong principle in charging *Kennon* with the whole effects as money, the whole report is set aside, as far as it contains the accounts, except that part which adopts the statement of the balance sheet of April 10th, 1777, of the *debt* to *R. & E. McNair*, of £1853 5 3, and reduces it, from the admissions in the bill, to £1701 15 2 on the 1st July, 1777, which makes it unnecessary to pass particularly on the exceptions of the Defendant. And the case must be again referred, to have the accounts taken upon the principles here laid down, if the Plaintiff chooses to proceed therein. And the Court reserves all equity, arising out of any payment made by *Kennon*, under, or by colour of the confiscation acts, as far as it respects every part of the Plaintiff's demand, except one half of the said debt of £1775 4 9. And also refrains from declaring, whether, in fact, he did, or did not make such payment.

PER CURIAM.—This cause coming on to be heard on the report of the Clerk, and the exceptions, the Court considers that the account stated by the Clerk is based upon a wrong principle in this: that the intestate *Kennon* is charged with the whole interest of *Ralph McNair* and *Ebenezer McNair* in the effects of *Richard Kennon & Co.* as cash in said *Kennon's* hands, and a debt from him to said *R. & E. McNair;* and also inthis, that no account is stated of the copartnership, and therefore the Court doth set aside the report &c.

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And doth declare, that it appears by the balance account of *Richard Kennon* & *Co.* of April 10, 1777, that *R.* and *E. McNair* were then, *creditors* of the firm of *Richard Kennon* & *Co.* in the sum of £1853 5 3; which was reduced as admitted in the original bill by payment on 1st July, 1777, to the sum of £1701 15 2, at the rate of $2,50 to the pound, and that *Richard Kennon* was *debtor* of said *Richard Kennon* & *Co.* in the sum of £73 9 7. Declare further said *Richard Kennon* liable, in case of the total loss of the other effects of said firm of *Richard Kennon* & *Co.* to pay to his said copartners the amount of his said own debt towards their said debt of £1701 15 2, and also (after deducting from the said sum of £1701 15 2, the said sum of £73 9 7,) liable to pay to them one half of the residue, namely, the sum of £814 2 9 with interest on the said two sums of £73 9 7, and £814 2 9, from the 4th day of July, 1782, as his, the said *Kennon's*, share of the loss of said *Richard Kennon* & *Co.* if such total loss did in fact happen: and declare further, that the Defendants received assets of their intestate to a larger amount in slaves and other specific chattels, (which they now hold, or have wasted,) than is sufficient to pay the said sums and interest as aforesaid: And decree, that the Defendants pay to the Plaintiff the sum of $6000, in part of, and towards the said debt, and that execution issue therefor, against their bodies and proper estates; and refer again to the Master &c.

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Edmund D. McNair, adm'r of Ralph McNair, v. Thomas Ragland et al. adm'r of Richard Kennon, } From Chatham.

An administrator, who has revived a suit of his intestate, need not produce his letters of administration at the hearing of the cause; it is sufficient, if he produce them when the order to revive was made.

It seems, that if a Defendant in Equity intends to rely upon the statute of limitations, it must be pleaded.

Whether accounts between copartners are in any case barred by the statute of limitations—*Qu?*

But where there is an agreement between copartners, under seal, to account, a bill for an account is not barred, before an action on the covenant would be.

Any delay in suing, which can be satisfactorily accounted for by the course of public events, will not be construed into an abandonment or satisfaction of the Plaintiff's demand.

In Equity, an admission in the plea may be used by the Plaintiff against the Defendant.

After the argument of this cause (*reported ante p.* 516,) on the report of the Master and the exceptions thereto, the Defendant, *Ragland*, filed a petition to rehear the order of this Court, made at June Term 1829, referring the accounts to the Master, under which order the report which has already been stated was made. The grounds upon which the order was sought to be set aside, will be found fully stated in the opinion of his Honor Judge RUFFIN.

Winston for the Defendant, *Ragland*, cited *Humphreys* v. *Humphreys*, (3 *P. Wms.* 349.) *Osgood* v. *Franklin*, (2 *Johns Ch. R.* 1.) *Fell* v. *Lutridge*, (2 *Atk.* 120.) *Doolittle* v. *Lewis*, (2 *Johns C. R.* 45.) *Goodrich* v. *Pendleton*, (4 *Johns. C. R.* 551.) *Willis* v. *Jernigan*, (2 *Atk.* 252.)—*Barber* v. *Barber*, (18 *Ves.* 286.) *Martin* v. *Heathcote* (2 *Eden.* 169.) *Coster* v. *Murray* (5 *Johns.* 522.) *Foster* v. *Hodgson*, (19 *Ves.* 180.) *Beckford* v. *Close*, cited in 2 *Bro. C. C.* 644—*Hardy* v. *Reeves*, (4 *Ves.* 479.) *Hodle* v.

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Healy, (1 *Ves. & Bea.* 536,) *Mitford* 100. *Sturt.* v. *Mellish*, (2 *Atk.* 1, 179.) *Sherman* v. *Sherman*, (2 *Vern.* 276.) *Lacon* v. *Briggs*, (3 *Atk.* 105.) *Murray* v. *Toland*, (3 *Johns. C. R.* 574.) *Ray* v. *Bogart*, (2 *Johns. Ca.* 432.)—*Yates* v. *Bloodgood*, (7 *Johns. C. R.* 90.)

Seawell, *contra*.

RUFFIN, Judge.—Since this cause was argued on the report of the Master, and the exceptions, (*ante* 516) the Defendants have filed a petition to rehear the cause, and reverse the order of June, 1829, to account, under which the report has been made.

The first objection to the relief is, that there is no proof of the death of *Ralph McNair*. That is susceptible of two answers: one, that it is presumed from the grant of letters testamentary to *Ebenezer McNair*, and of administration *de bonis non* to the present Plaintiff: the other, from the great length of time since he was heard of; there being no proof in the cause that he was alive, since he was mentioned in the act of 1779, as having adhered to the enemy, and gone out of the United States.

Another objection is taken, that the present Plaintiff does not show his own letters of administration. He states them in his bill of revivor, and they are not admitted in the answer. It is not necessary, that he should have them on the hearing of the original cause. It was sufficient, that he should show them when he applied for the order, that the suit should stand revived. It is like reviving at Law, upon the death of the Plaintiff. The Court must decide upon the character of the person applying to revive, before he is allowed to revive. At Law there is no plea given, which can put that character in issue; for the suit is to stand revived, in the same plight in which it stood when the original party died. The Court then *ex necessitate* decides the question on motion, and by inspection of the letters of administration. If at any time it should be made to appear, that an imposition

has been practised on it, the Court possesses full power to protect itself, and to do right to the parties. But the party is not to be held always prepared with his proof. The letters form no part of the evidence on the hearing of the first suit. Here, the order of revivor is expressed in these words: "It appearing to the Court, that *Edmund D. McNair* has authority to revive the original suit, it is ordered to be revived." This is conclusive in all subsequent stages, until that order itself be reversed.

It is next insisted, that the Plaintiff is barred by the statute of limitations. That would not follow, were the case one to which the statute applied. For it is a part of the case, that the *McNairs* departed from the country, and although *Ebenezer* was a resident of Virginia when he filed his bill, it does not appear how long before he had returned. If the bill must bring the case out of the statute, this does it *prima facie*, until a return to the country shall be shown on the other side. There is no plea of the statute, nor is it relied on in the answer. The Court does not mean to say, that the late English cases are not law, which dispense with a plea of the statute, and allow it to be taken advantage of on demurrer, or at the hearing; though we incline to the opinion expressed by *Lord Thurlow*, in favor of a plea; because that prevents surprise, and the Plaintiff, upon notice, might show himself within an exception. But in our opinion, this case is not within the statute at all; being between copartners, touching their copartnership dealings, and constituting a trust, appearing upon articles under seal. Whether it would be so, if such were not the articles, we more than doubt. But where there is an agreement under seal to account, a bill for an account cannot be barred, certainly, before an action on the covenant would.

Nor does the Court think the lapse of time destructive of the Plaintiff's rights. It would be, were the transaction one of ordinary times, and between citizens of the

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country. Several years were those of war. Upon the peace, the treaty gave the power to sue, it is true. But we know, that every resistance was made to the claims of British creditors, both by the debtors themselves, and the citizens generally. Until the adoption of the Federal Constitution, in most of the States, the Courts refused to execute it, upon the ground that the British violated it, by refusing to surrender the western posts. Respectable professional gentlemen throughout the country maintained, and often sustained that position in Court. In this State, it was found necessary by the Legislature, as late as November, 1787, to enforce it by statute; and even after that, the effect of confiscation was violently contested, and never settled, until the case of *Hamilton* v. *Eaton* (*Martin* 77) in this State, and that of *Ware* v. *Hylton* (3 *Dallas* 199) went up from Virginia to the Supreme Court of the United States in 1796. This suit was not long delayed after those decisions. A delay thus accounted for by the course of public events, cannot be construed into an abandonment or satisfaction of the Plaintiff's demand.

The Defendant has likewise insisted, that there is no proof of the copartnership, or of the balance account, which forms the basis of the present demand, and of the accounts directed. It seems that the originals of those documents have been lost out of the Master's office, during this protracted litigation. But a copy of the balance account remains, and is identified by the deposition of the Master in Orange, as having been admitted before him by the Defendant, *Ragland*, to be a copy. But that it is a copy, and that the original was a genuine paper, is placed beyond doubt by the plea formerly put in by all the Defendants. That plea states, as its very point, this account, and relies on it as a *stated account* between the parties, on which there was a remedy at Law. There can be no higher evidence than this. It is not like a plea at Law, where each plea is independent. But here is a

positive admission on oath, and to this purpose, it is the same as if it were in the answer. From this document, if there were no other evidence, the partnership is clearly established; for the fund is stated, the debt to *R. & E. McNair*, and the several amounts and proportions of profits of each partner, as alleged in the bill. Besides this, the books of the firm contain evidence equally strong.

The order complained of must therefore stand, and is affirmed.

PER CURIAM.—Petition dismissed.

William Harrison
v.
William H. Battle and Nathaniel Hunt et al. } From Franklin.

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McKeithan v. Walker 66 N.C. 95

Under the first section of the act of 1812 (*Rev.* c. 830) subjecting trust estates to execution, only such estates as are held in trust for the Defendant in the execution solely, are within the operation of the act. As the Sheriff's deed transfers the estate of both the trustee and *cestui que trust*, those cases where it is necessary for the purposes of the trust, that the trustee should retain the legal estate, are not within its operation. As in case of a conveyance to sell and pay debts, and then in trust for the bargainor, the estate of the trustee is not destroyed by an execution sale of the interest of the *cestui que trust*.

But the interest of the bargainor, after payment of the debts, being in no respect distinguishable from an equity of redemption, may be sold under the second section of the act.

That section subjects equities of redemption in land only, to execution sales. The same interest in chattels is left as at common law, and can be subjected to the satisfaction of an execution, only in a Court of Equity.

Before the passage of the act of 1812, a Court of Equity lent its aid to an execution creditor, to subject an equity of redemption subsisting in favor of the Defendant, to the satisfaction of the execution. It will do so still, especially as the remedy is not so perfect at Law, as it can be made in this Court, by ascertaining, before a sale, the amount of the debts charged upon the land.

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A creditor must establish his debt at Law, to entitle himself to the aid of a Court of Equity. But a return of *nulla bona* is unnecessary, where it appears that all the debtor's property has been placed beyond the reach of final process.

Where lands and slaves were conveyed, in trust to pay debts, with a resulting trust in favor of the bargainor, and after its execution, the bargainor made further assignments of the resulting trust, to secure debts, and judgments were also recovered against him—*held*, that executions bound the resulting trust in the land from the *teste*; and if they overreached the assignments, had a priority; and that as to the resulting trust in the slaves, it was bound in Equity in favor of the creditor who first filed his bill, without reference to the *teste* of his execution; and that assignments made before the filing of the bill had a preference.

Creditors secured by the deed upon both land and slaves, are, in favor of the execution creditors, having a lien upon the resulting trust in the land, marshalled, so as to have their debts satisfied *pro tanto* by a sale of the slaves.

The Plaintiff alleged, that he was the surety of the Defendant *Hunt*, in a note for about $2,600, discounted at the Bank of Newbern; that *Hunt* being in failing circumstances, the Plaintiff had procured an action to be brought by the bank, in which judgment was recovered by the Plaintiffs at Law, at September Term, 1828, of the County Court of Franklin. That pending the action, viz: on the 6th of September, 1828, the Defendant *Hunt* had conveyed to the Defendant *Battle*, all his property, which could be seized under an execution, in trust to pay certain debts due by him, *Hunt*, which were mentioned in the deed—with a trust as to the residue, after paying those debts, to *Hunt*—that the property thus conveyed, was much more in value than the debts secured by the deed—that execution upon the judgment obtained by the Bank of Newbern, issued, which the Plaintiff procured to be levied upon the property thus conveyed, subject to the claim of the Defendant, *Battle*,—and that if the Defendant, *Battle*, sold only so much of the property conveyed as was necessary to pay all the debts secured by the deed to him, that there would be a large surplus, amply sufficient to satisfy the execution in favor

of the bank; but that the Defendant, *Hunt*, had given sundry orders upon the Defendant, *Battle*, for the surplus, over and above the sum due on the debts thus secured, and threatened to exhaust the same by similar orders, and that if the Defendant, *Battle*, should sell, in consequence of these orders, and pay over accordingly the whole of the proceeds in his hands, there would be nothing from which the Plaintiff could be indemnified, against his liability as the surety of the Defendant, *Hunt*, who was insolvent.

The Plaintiff then averred, that he had made the Bank of Newbern secure, in the ultimate satisfaction of their judgment, and had taken an assignment thereof.

The prayer was for an injunction, restraining the Defendant, *Battle*, from selling more of the property conveyed to him, than was necessary to satisfy the debts secured by the deed of trust, and that the residue in his hands might be subjected to the satisfaction of the execution in favor of the President and Directors of the Bank of Newbern, who were also made Defendants.

The Defendant, *Battle*, in his answer, admitted the execution of the deed of trust to him, by the Defendant, *Hunt*—that before the sale of any property under the deed, and on the 23d of October, 1828, he received notice of an assignment of the residue in his hands, made by the Defendant, *Hunt*, on the 16th of that month, to *Thomas T. Russell* and *George W. Freeman*, to secure them, as the sureties of *Hunt*, in two notes for $1000 and $800, held by the Bank of the United States: That on the 1st of January, 1829, a similar assignment of the residue, after satisfying *Russell* and *Freeman*, was made by the Defendant, *Hunt*, to secure *Peter Arrington*, in the sum of $1400, and on that day notice thereof was given to him, the Defendant *Battle*: And that also, on the 12th of February, 1829, a similar assignment of the surplus, after satisfying *Russell*, *Freeman* and *Arrington*, was made by *Hunt*, in favor of *James Hilliard*, to secure

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the sum of $424, notice of which was also given him. That he, the Defendant, not believing he had power to sell under the deed of trust, made by *Hunt* to him had, done no act, whereby he in any way sanctioned those assignments, and had merely acknowledged notice of them: That the personal effects of the Defendant, *Hunt*, had been sold, to the amount of $10,456, with which all the debts, secured by the deed of trust, had been paid, and that a valuable real estate, and several slaves, and other minor articles of personal estate, were yet unsold, the legal title of which was still in him. The Defendant disclaimed to hold any thing beneficially, and submitted to any decree which would indemnify him.

The Defendant, *Hunt's* answer corresponded, in every respect, with that of the Defendant *Battle*.

The assignment of the judgment and execution, by the President and Directors of the Bank of Newbern, to the Plaintiff, was admitted by them, and not denied by the other Defendants. *Russell*, *Freeman*, *Arrington* and *Hilliard* were made Defendants, and by their answers, only set up the several assignments made to them, as stated in the answer of the Defendant, *Battle*.

By an order made in the cause, *Battle* was directed to sell all the property of the Defendant, *Hunt*, remaining unsold, and hold the proceeds subject to the decision of the Court.

By another order, all the execution creditors of the Defendant, *Hunt*, were allowed to make themselves parties; and a number of them availing themselves of this liberty, a reference to the Master was made, to ascertain the amount of their judgments, and the time when executions issued upon them, together with the return thereof.

The cause was heard upon these facts, and the reports of the Master on the above reference, and of the commissioner *Battle*, as to the sale of the residue in his hands, after paying the debts secured by the deed of trust.

The cause was argued at December term, 1829, by *Seawell*, *Gaston & Badger*, for the Plaintiff; and by the *Attorney General*, for the assignees of the residuum: and at the last term, by the same gentlemen for the Plaintiffs, and by *W. H. Haywood*, for the assignees.

CUR. VULT. ADV.

HENDERSON, Chief-Justice.—The *fieri facias* of the Newbern Bank, to whose rights *Harrison* is substituted formed no lien, independent of our act of 1812, (*Rev. c.* 830) on *Hunt's* interest in the property conveyed in trust to *Battle*, neither this property itself, nor the trust resulting to *Hunt* being the land, tenements, goods or chattels of *Hunt*. As therefore it could not be levied on, or sold by the common law, to satisfy the execution, no lien arose by its issuing, or what the Sheriff calls its levy. For as the lien arises, or is created, as a mean to the end, it would be in vain for the law to raise it, when the end could not be attained. Nor is the trust in favor of *Hunt* one of that description, authorized to be taken in execution, under the first section of the act of 1812. The use or trust, there spoken of, is a pure and unmixed one; for the doing execution under that section, to use its own terms, divests the estates both of the trustee and *cestui que trust*, and transfers them to the purchaser. In the present case therefore, if it operated, it would give both *Hunt's* and *Battle's* estates to the purchaser, under the *fieri facias*, and entirely disable *Battle* from performing the other trusts. In other words, *Battle* is not seised or possessed to the use of, or in trust for *Hunt*, but to the use of *Hunt* and others, whose interests are no ways united with *Hunt's*, but are entirely of a different nature. This has been the construction, heretofore put upon the act, and it is believed to be the correct one.

But we believe, that so far as regards the land, *Hunt's* interest may be sold under the second section of the act; for we cannot distinguish his right to have the lands

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again, after the payment of the debt, for which this stood as a security, from an equity of redemption. It has all the essentials of that right, although it wants some of its formal parts; it is conveyed to secure the payment of a debt; upon the payment of the debt, *Hunt* has a right to call for a reconveyance. Whilst in his possession, by the creditor's consent, he is not accountable for the profits. This trust, to be sure, can be closed by a sale, without the intervention of a Court of Equity. The aid of this Court to foreclose an equity of redemption, is required only because the law will not trust the creditor to be both his own agent, and that of the debtor, whose rights it may be his interest to sacrifice. This trust is free from that objection, because the parties have agreed on their trustee. We cannot therefore distinguish this interest from an equity of redemption; and its exemption from sale, under a *fieri facias*, is equally an evil with the exemption of equities of redemption. The mischief is precisely the same, and we therefore think it within the spirit of the second section of the act of 1812.

But that act affects equities of redemption in real estate only: "lands, tenements, rents and hereditaments," are its words. It extends not to trusts, arising out of personal estate. As to that, therefore, the execution formed no lien. We also think, that the execution creditor has the right of coming into this Court, to make the lien effectual as to the land. For although he has a remedy at Law under his execution, it is not an effectual one. If he sells at Law, he must sell *Hunt's* right of redemption only. Its value is unknown. It depends on how much of the debts are paid. This might be known to some, and unknown to others. Bidders, therefore, would stand on unequal grounds; and after a sale, a purchaser would have to come into this Court, to compel the trustee to settle the trust debts, and to receive them from him; or to make a sale to raise them, and to pay him the overplus. A sale of property so situated would

encourage speculation, that bane of steady and persevering industry and sound morality.

These are some of the reasons which induce the Court to lend its aid. I admit they impugn the policy of the second section of the act of 1812. But the jurisdiction of this Court is not ousted, because a remedy is given at Law, unless it be a plain one. The remedy here is more effectual, because this Court ascertains all the claims upon the thing, and sells the *corpus* itself. The purchaser gets what he purchased, no more and no less. He does not make his gain by another's loss.

As to the trusts upon the personal estate, there is no remedy but in this Court; and that there is here, we entertain no doubt. For do we not mean to consider this a debt due from *Battle* to *Hunt*, even after sale, but as *Hunt's* property in his hands, which cannot be reached at Law. As to the property before the sale, there is no doubt; for it is an estate or interest in Equity, and so it is after sale. For *Battle* is not his debtor, but his trustee. He holds the money as he held the property. When the question of a pure debt arises, it will be time enough to consider, whether it cannot now be reached to satisfy debts. As to the want of the return of *nulla bona*, to give a right to call in the aid of Court, it is deemed to be unnecessary. In this case clearly it is not required, as to those executions which attach on the real fund—and we think that the want of it is supplied, as to all the judgments; for the deed in question conveys the whole of *Hunt's* property, which an execution could reach. But still the *mere creditor* must establish his demand by a judgment. As to the orders and assignments, they have a clear priority over all executions on the personal fund, before such creditor by execution became a party to this bill; that is, orders and assignments have priority to mere judgment creditors, before they became parties Plaintiffs. But the *teste* of an execution, which overreaches these assignments or orders, will have priority

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over them, as regards the real estate. As to the other judgments competing with each other, they all stand on equal grounds, regardless of the time of their being obtained, or execution issued thereon. An *alias* or *pluries* execution regularly kept up, will as to trust estate in the land, relate back to the *teste* of the original.

The Master will make an additional report to the next Court, in which he will ascertain the net sum in the hands of the trustee, and will charge him with interest, if he has made interest, and may interrogate him on oath as to that point. He will allow him a commission of two and a half per cent, besides actual expenditures in relation to the trust, and in his attendance in this suit. He will distinguish between the proceeds of the real and personal estate; the amount of debts paid under the trust deed, and charge them in the first instance to the personal fund. He will present a scheme for distribution, according to the principles of the foregoing opinion. Judgments, which are partly satisfied out of the real estate, will come in for balances with other judgment creditors. To give the directions in a few words, they are these: As to the real fund, executions bind from their *teste*—orders and assignments from their date on both funds—they are of equal dignity; priority of right of satisfaction being gained only by priority of date. Becoming a Plaintiff precludes voluntary transfers as to him. All judgments affecting the personal fund stand in equal degree. The costs are to be paid out of the fund. The funds are directed to be marshalled, in favor of those execution creditors, who had obtained a *lien* at Law upon the real fund, because the creditors under the trust deed have two funds at Law; they but one.

MEMORANDUM.

AT the recent session of the Legislature, DAVID L. SWAIN, Esq. of Buncombe County, was elected a Judge of the Superior Court, *vice* WILLIE P. MANGUM, Esq. of Orange County, who resigned.

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ABATEMENT OF LEGACIES.
Vide *Legacies*, 2, 11, 12, 13.

ACCOUNT.
Vide *Administrators*, 6; 9, 16.

ADMINISTRATORS & EXECUTORS.

1. A settlement made by an administrator with commissioners appointed by an order of the County Court is no way binding upon the next of kin.—*Wood* v. *Barringer*, 67
2. Where negroes were specifically bequeathed, and the share of one is set apart, and a profit is made by the administrator on another share belonging to an infant, this is no severance of of the tenancy in common, and this profit may be recovered by the infant, in a joint bill for an account filed by all the legatees. *Id.* 67
3. Commissions to executors are not a right attached to the office, but an allowance for their trouble and risk in settling the estate. Therefore, where there were two executors, and one took upon himself more than half the trouble and risk, it was held, that he was entitled to more than a moiety of the commissions. *Grant* v. *Pride*, 269
4. Where slaves are given by will for life, with a remainder over, the assent of the executor to the legacy for life, is an assent to that in remainder.—*Alston* v. *Foster*, 337
5. Where an executor has assented to a specific legacy, and afterwards an execution issues against the goods of the testator, in his hands, a purchaser of that specific legacy, at a Sheriff's sale under the execution, acquires no title. *Id.* 337
6. The lapse of thirty years is no bar to an account of an administration. But where a legatee had given a bond to exonerate the executor from his office, as if he had never qualified, this was held to be evidence of a settlement, and unexplained, to be a bar to an account. *Ivey* v. *Sumner*, 338
7. *Qu.* Is not such a bond a release.—*Id.* 338
8. An administrator Defendant, who denies the right of the Plaintiff, and neither renders an account, nor pays money into Court, is chargeable with interest from the time the Plaintiff's right accrued. *Johnson* v. *Person*, 364
9. Where an estate is charged with the education of children, and a near relative takes that charge upon himself, upon an account between the children, he is to be taken as having intended a benefit to the estate, and not a personal bounty to the children.—*Id.* 364
10. An executor who does not render an account and swear that he has not used the fund himself, nor loaned it to others, but has kept it on hand for the purposes of his trust, is to be charged with interest from the date of his receipt of the trust money. *Arnett* v. *Linney*, 369
11. An executor who has used any part of the trust fund for his own advantage must be held to a strict interest account, unless he keeps such account, and produces and verifies it before the Master. *Id.* 369
12. An executor who buys at his own sale, however openly or fairly, holds the property at the election of the legatee, and one who purchases in conjunction with him is subject to the same rule. *Cannon* v *Jenkins*, 422
13. But where an executor at his own sale bid fairly, for the purpose of enhancing the price, and the property being struck off to him, sold it the same day, without collusion to one who had bid against him, altho' the executor would have held it subject to an account, yet his purchaser, the sale being a distinct transaction acquired an absolute title. *Id.* 422
14. Sales of slaves in lots are not favored in Equity, because slaves generally sell better singly; and the person who

conducts such sales does it at the peril of answering for the true value. But where the slaves are sold in families. altho' the executor has no right to consult his feelings at the expense of the legatees, yet he will not be charged the full value, unless the interest of the legatees is manifestly injured by the mode of sale. *d.* 422

15. Executors are justified by sales at auction in the usual way. But if they depart from this method, and sell at private sale, they are answerable for the full value. *Id.* 422

16. The representatives of an administrator cannot be compelled to account with any person but an administrator *de bonis non*. *Id.* 422

17. A creditor of an executor, who has has taken a security for his debt upon the assets of the testator with notice, cannot hold them against the legatees. *Huson* v. *McKenzie*, 463

18. A single act of mal-administration cannot be made the foundation of a suit against an executor; but the whole administration must be inquired into, and if the frame of the bill does not permit this, it must be dismissed. *Id.* 463

19. One of several administrators, who assents to the delivery, by his co-administrator, of the assets to the next of kin, before the payment of debts, is guilty of a *devastavit*. So also, if the assets were delivered over in obedience to the decree of a Court, unless he shows that it was made *in invitum*. *McNair* v. *Ragland*, 516

20. An administrator, who has revived the suit of his intestate, need not produce his letters of administration at the hearing of the cause; it is sufficient, if he produce them when the order to revive was made. *Id.* 533

Vide *Lapse of time*, 2, 3, *Bill of interpleader*, 1, 2, *Statute of Limitations*, 2, 3, *Trust*, 10, *Sureties*, 4, *Interest*, 1.

ADULTERY.

Vide *Divorce*, 1, 2.

ADVANCEMENT.

Vide *Slaves*, 3.

AGENT.

Vide *Depreciated currency*, 3, *Interest*, 3,

AMBIGUITY.

Vide *Legacies*, 9, 10.

AGREEMENT.

1. A post-nuptial agreement made upon sufficient consideration between husband and wife, will be enforced in Equity. *Liles* v. *Fleming*, 185

2. Where there was an agreement to settle property upon the wife, and the husband, by will, bequeathed that property to a stranger, it was held, the wife having dissented from the will, that her right to a child's part of the personalty, could be defeated only by a satisfaction in express words, or one resulting from a necessary implication, and there being neither, that she was entitled both to the settled property and to her child's part.—*Id.* 185

3. Where a son, who died intestate, unmarried and without issue, is bound by his agreement to support his mother, it was held, that she having succeeded to his personal estate absolutely, and to his real estate for life, had no claim against the heirs on account of their interest in the land, expectant upon her life estate, notwithstanding she had advanced the money for the purchase of the land. *Taylor* v. *Vick*, 274

4. One who has conveyed his property in trust to secure his own debt, and has assented to a sale of it upon disadvantageous terms, cannot in Equity, obtain a re-sale of it, altho' it was purchased by the creditor whose debt was secured. *Haines* v. *Cowles*, 420

5. But other creditors, who have been injured by the sale, will be aided.—*Id* 420

Vide *Contract*, *Bills of Exchange*, 2, *Statute of Limitations*, 6.

ALTERATION OF WRITTEN INSTRUMENTS.

Vide *Bills of Exchange*.

AMENDMENT.

Vide *Injunction*, 3.

ANSWER.

1. It seems, where the lapse of time forms no bar to the claim asserted, but only raises a presumption of fact in-

consistent with it, the lapse of time must be relied on, in the answer, as a defence. *Nesbit* v. *Brown*, 30
2. A bill, the allegations of which are directly denied by the answer and supported by one witness only, without corroborating circumstances, will be dismissed. *Alley* v. *Ledbetter*, 449
3. New matter, brought forward in the answer as a defence, which would have aided the Plaintiff, had the bill been framed in reference to it, cannot be used to sustain the relief sought. *Green* v. *Branton*, 500
Vide *Practice*, 3, *Injunction*, 4, *Jurisdiction*, 10.

ASSIGNMENT.

1. The assignor of a term for years has, in Equity, no lien upon the land for the money agreed to be paid, as the consideration of the assignment.—*Norfleet* v. *Cotton*, 334
Vide *Trust*, 8.

AUCTION SALES.

1. The employment by the vendor of by-bidders, to enhance the price at an auction sale is a fraud, for which Equity will set aside the contract, on a bill filed by the purchaser at such sale. *Morehead* v. *Hunt*, 34
2. The employment of a puffer at an auction sale is a fraud upon the bidders; and a Court of Equity will direct a bond, given by a bidder for property bought under such circumstances, to be delivered up. *Woods* v. *Hall*, 411
Vide *Administrators and Executors*, 12, 13, 15.

AWARD.

1. An award may be corrected for error in law, where it appears on its face that the arbitrators intended to decide according to law, but have made a mistake. *Ryan* v. *Blount*, 382

BAILMENT.

Vide *Statute of Limitations*, 1, *Gift*, 2.

BASTARDS.

1. Where there are children of the same mother, some born in wedlock and some illegitimate—the former class may inherit from the latter, and the latter may inherit from each other; but the latter cannot inherit from the former, nor can the mother, in any case, inherit from the latter. *Flintham* v. *Holder*, 345
Vide *Contract*, 1. *Consideration*, 5.—*Marriage settlement*, 5.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Where the payee of a promissory note mutilated it, by cutting of the name of the attesting witness, *held* that he was entitled to no relief in a Court of Equity. *Sharpe* v. *Bagwell*, 115
2. A bill was accepted for the accommodation of the drawer, and this fact was known to the indorser who when his indorsement was made, received from the drawer a bond and mortgage conditioned to be void if he should be indemnified against that and any subsequent indorsement. The drawer then conveyed the mortgaged premises in trust, to secure all his debts, with instructions in the deed to the trustee, to pay such debts first "as may be indorsed by the said indorser." After this conveyance, the bill being protested was taken up, by giving the holder the note of the drawer, with the acceptor and indorser as sureties, which was paid by the acceptor, who procured an assignment of all the securities in the hands of the indorser and holder. *It was held*,
1. That there being no contract whereby the indorser and acceptor agreed to become co-sureties, the latter had no right to contribution from the former.
2. That the indorser being liable only on the default of the acceptor, the latter could not be subrogated to the rights which the holder had against the former.
3. That the mortgage being made for the personal indemnity of the indorser only, and not for the security of the *debt*, the acceptor had no right to pursue the fund, and that the indorser being indemnified by the acceptor's payment, the mortgage was *functus officio*.
4. That a mortgage to secure subsequent indorsements rested merely in contract, and was available for those only which were made while the property remained under the

control of the mortgagor. *Gomez v. Lazarus*, 205
Vide *Sureties*, 1, 2, 3.

BILL OF INTERPLEADER.
1. A bill of interpleader can be filed only by one in possession. Therefore where an administrator never had reduced the assets into possession, but they were in that of some of the distributees, who claimed adversely to him, a bill by him against the distributees, praying that they might interplead, is improper. *Martin v. Mabberry*, 169
2. But the Defendant to such bill, who claimed adversely, having answered, filed a cross bill, submitted to an account, &c. he was enjoined from computing the time spent in this litigation, in bar of an action at law to be brought by the administrator. *Id.* 169

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COLLATERALS.
Vide *Marriage Settlement*, 2, 4.

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Vide *Administrators and Executors*, G.

CONDITIONAL SALES.
1. Where, upon the face of a transaction, it is doubtful whether the parties intended to make a conditional sale, or a mortgage, Courts of Equity incline to consider it a mortgage; because by means of conditional sales, oppression is frequently exercised over the needy. *Poindexter v. M'Cannon*, 378
2. But there is no rule of Equity, which forbids the making of conditional sales. And where the subsequent acts of the parties are consistent with the idea of a sale, a redemption is not decreed. For altho' the acts of the parties are never regarded at Law as a rule of construction, yet in Equity they are considered as evidence of the intent. *Id.* 373
3. Where upon the purchase of a slave, a full price was paid, and no bond or covenant taken for the repayment of the purchase money, in case of the death of the slave, and possession was given immediately, *held*, that these circumstances, added to the fact that the buyer was necessitous, and that twelve years had elapsed before redemption was claimed, proved that a clause, whereby the seller reserved to himself the power of annulling the bargain, did not render the transaction a mortgage, but a conditional sale, to claim the benefit of which there must be a strict performance by the seller. *Id.* 373

CONFISCATION ACTS.
1. The treaty of 1783 revived the rights of British creditors and restored them the right to sue, as if the confiscation acts had not been passed. The war of 1812, there being no new confiscation acts, did not affect those rights, otherwise than to suspend the right of suing. *McNair v. Ragland*, 516
2. Whatever may be the effect of the treaty of 1783 upon the mutual rights of copartners, where the whole partnership property, or a portion of it, belonging to an alien partner, was seized under the confiscation laws, yet where the copartnership owed the alien partners for advances, the resi

dent partner's share of these advances constituted, in Equity, a debt, which he owed his copartners, and which is within the treaty. *Id.* 516
Vide *Interest*, 3, 4.

CONSIDERATION.
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Vide *Depreciated currency*, 1, 2, 3, 4.

CONTRIBUTION.
Vide *Sureties*, 1, 2, 3, 4. *Bills of Exchange*, 2. *Mortgage*, 3, 4, 5.

CONTRACTS.
1. An executory contract, made in consideration of an intended marriage, whereby the parties covenant to make a provision for an illegitimate child of the wife, will, under the act of 1799, be protected in a Court of Equity—and its specific execution enforced, in favor of such child, against the husband. *Kimbrough* v. *Davis*, 71
Vide *Fraud*, 1, 2, *Auction Sales*, 1, *Agreement*, *Statute of Frauds*, 1, *Partners*, 2, *Marriage Settlement*, 5, *Mistake*, 1, 2, *Specific Performance*, 1, *Remedy*, 1, 2. *Usury*, 1, 2, 3, 4.

COSTS.
1. It seems, where a claim is asserted on the part of infants, who have an appearance of right, each party must pay his own costs. *Kirk* v. *Turner*, 14
2. Upon the removal of an Equity cause to this Court, under the act of 1818 (*Rev. c.* 962) the original papers are to be sent here; and if the Clerk below sends copies of them, the costs of the copies cannot be taxed. *Lee* v. *Norcom*, 372
Vide *Trust*, 16.

COUNTY COURT.
Vide *Jurisdiction*, 4, 5.

COVENANT.
1. Where one sells the land of another, setting out the title of the latter, and covenanting against it, no estate passes by the deed, and a second vendee cannot sue at Law, in his own name, on the covenants. *Nesbit* v. *Brown*, 30
2. Where a vendor covenanted, in case of eviction, to pay double the purchase money, and also damages, it was held to be a penalty, not stipulated damages, and the purchase money and interest only could be recovered. *Id.* 30

CREDITORS.
1. A creditor, who takes an incumbrance to secure an antecedent debt, without releasing a surety, is not such a purchaser as is protected by want of notice. *Donaldson* v. *Bank of Cape Fear*. 103
2. A mere creditor, who has not obtained a lien by judgment, has no right to the aid of a Court of Equity, to follow the property of his debtor.—*Id.* 103
3. Where lands conveyed to D, M, & Co. and also to M, in trust for D, M, & Co. were conveyed by M, who died insolvent, indebted to the company, and without personal representation, to secure his individual debt, it was held, upon a bill filed by a creditor of the copartnership, to subject this property:
   1. That the creditor of M was not a purchaser for value, within the meaning of the rule which protects them when they are not affected with notice.
   2. That nothing passed by the deed, in the land conveyed to D, M, & Co.
   3. That no decree could be made founded on the fact that M was a debtor to the company, until his estate was represented.
   4. That the Plaintiff, not having established his demand, and having no lien, had no right to the assistance of a Court of Equity. *Id.* 108
4. Where there are two creditors, one of whom can obtain satisfaction only from the visible property of the debtor, and the other can subject not only that, but a special fund created for this indemnity; altho' a Court of Equity will compel the latter to resort to the special fund, or will subrogate the first to his right to that fund, yet the first creditor must demand this, before the latter has received satisfac-

tion from the visible property. If he waits, he has no equity against a third creditor, who obtains an assignment of the special fund. *Williams* v. *Washington*, 137

5. In Equity, a surety, in respect to his liability, is regarded as a creditor, and has a right to all the privileges of one. *Id.* 137

6. A surety has, in respect to his liability, the rights of a creditor, and upon the insolvency of the principal debtor may retain any funds belonging to him in his hands. *Williams* v. *Helme*, 151

7. Therefore, where the surety owed the principal debtor, who became insolvent, and assigned for value the debt due by the surety, *held* that the latter might retain the amount of his subsequent payments against the assignee. *Id.* 151

8. Before the passage of the act of 1812, a Court of Equity lent its aid to an execution creditor, to subject an equity of redemption subsisting in favor of the Defendant to the satisfaction of the execution. It will do so still, especially as the remedy is not so perfect at Law, as it can be made in this Court, by ascertaining before a sale, the amount of the debts charged upon the land *Harrison* v *Battle*, 537

9. A creditor must establish his debt at Law, to entitle himself to the aid of a Court of Equity. But a return of *nulla bona* is unnecessary, where it appears that all the debtor's property has been placed beyond the reach of final process. *Id.* 537

Vide *Lien*, 4, *Statute of Limitations*, 2, *Agreement*, 4, 5, *Mortgage*, 7, *Trust*, 2, 3. *Widows*, 2.

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Vide *Legacies*, 3. 4.

DEED.

1. A delivery of a deed is a parting with the possession of it by the grantor in such a manner as to deprive him of the right to recall it. *Kirk* v. *Turner*, 14

2. Where a deed was handed to the subscribing witness as the agent of the grantor, for the purpose of being proved, and was by the agent returned to the grantor without being proved, *held* that this was not a delivery. *Id.* 14

Vide *Covenant*, 1, *Grant*, 1, *Husband and Wife*, 3.

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Vide *Deed*, 1, 2.

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Vide *Practice*, 7.

DIVORCE.

1. For adultery, the Court *may* divorce *a vinculo matrimonii*, but is not bound to do so It will in its discretion either dissolve the marriage, or decree a separation of the parties. *Collier* v. *Collier*, 352

2. Where a husband admits his wife to conjugal embraces, with knowledge that she has committed adultery, he may notwithstanding seek a divorce for her subsequent misconduct.—*Id.* 352

DEPRECIATED CURRENCY.

1. A debt existing before the depreciation in the currency which took place during the revolutionary war, might have been discharged in that currency But if not paid or tendered during that period, upon the subsequent resumption of cash payments, the whole sum is to be paid without reference to the depreciation. *McNair* v. *Ragland*, 516

2. A debt contracted while the currency was depreciated, upon the resumption of cash payments, must be discharged according to the rate of depreciation at the date of the contract. *Id.* 516

3. But an agent, charged with the collection of debts is responsible only for what he collects; and if he received a debt in the depreciated currency, upon a settlement made after the resumption of cash payments, is to account only for the value of the currency at the time it was received.—*Id.* 516

4. And where a collecting partner owed a debt to the co-partnership, contracted before the revolutionary war,

and also collected money due to the co-partnership during the depreciation of the currency, upon a settlement of his accounts, allowance was made for the depreciation upon money collected, but not upon the debt due from himself. *Id.* 516

DEVASTAVIT.

Vide *Administrators and Executors*, 20.

DEVISE.

1. In a devise of personalty, "to be equally divided between my son P, my daughters D, C, & E, and the heirs of my daughter P." *held* that the latter took but one fifth among them. *Ricks* v. *Williams*, 3

2. A testator directed his lands to be sold, and the proceeds divided among his "heirs not heretofore mentioned." Held, 1st, that the land should be considered as money, & that the word *heirs* meant those entitled under the statute of distributions. 2d. That the words *not heretofore mentioned* applied only to those taking beneficially under the will, and not to a legatee in trust.—*McCabe* v. *Spruill* 189

Vide *Legacies, Trust*, 7, 10.

DISCOVERY.

Jurisdiction, 10, 11, *Partners*, 2, *Possession*, 1.

DOWER.

1. Where the vendee of lands received no title, but only a bond to make one upon the payment of the purchase money, the dower of his wife in the land is not protected against the debt due the vendor for the purchase money.

Is the wife entitled to dower at all? *Qu.* *Kirby* v. *Dalton*, 195

ELECTION.

Vide *Legacies*, 8.

EQUITY OF REDEMPTION.

Vide *Trust*, 4, 21, *Creditors*, 8.

EVIDENCE.

1. In Equity, an admission in the plea may be used by the Plaintiff against the Defendant. *McNair* v. *Ragland*, 583

EXCEPTIONS.

Vide *Practice*, 1, 2

EXECUTIONS AND EXECUTION SALES.

Vide *Administrators and Executors*, 5, *Trust*, 19, 20, 21, 22.

EXECUTORS.

Vide *Administrators and Executors*.

FEME COVERT.

Vide *Husband and Wife*.

FRANCHISE.

Vide *Roads*, 1.

FRAUD.

1. Morality and good faith require, that the vendor should disclose to the vendee every circumstance which may induce the latter to change his mind as to the contract. *Alston* v. *Outerbridge*, 18

2. Where a trustee sold at auction a *fee simple* in the trust land, and before the execution of the contract the trustee and the *cestui que trust* discovered that the deed of trust created only a life estate, *held* that the concealment of this discovery was fraudulent, and vacated the contract, altho' the deed of trust was publicly read, and the trustee only undertook to convey the title he had, and altho' the *cestui que trust* refused to guaranty the title of the trustee. *Id.* 18

3. It seems that fraud practised by a *cestui que trust* will avoid a sale honestly made by the trustee. *Cheshire* v. *Boon*, 22

4. A misrepresentation by the vendor of a fact which materially affects the value of the property sold, and of which the vendee is ignorant avoids the sale. *Woods* v. *Hall*, 411

Vide *Auction Sales* 1, 2, *Widows* 2, *Voluntary conveyances*, 2, *Creditors*, 1, 2, 3, *Mortgages*, 2, *Notice*, 1, 2, 3, *Marriage settlement*, 1, 2, 4, *Trust*, 15, *Husbannd and Wife*, 6, 7, 8, *Mistake*, 1, 2.

GAMING.

1. Upon the construction given to the act of 1788 (*Rev.* c. 284) for avoiding securities given upon a gaming consideration, money lost and paid cannot

at Law, be recovered back. *Dunn* v. *Holloway*, 322

3. Therefore Equity will not interpose to restrain the collection of a judgment, obtained on a bond void under that Statute, unless the judgment was obtained by a fraudulent circumvention of the Defendant at Law. *Id.* 322

GIFT.

1. Where a father, upon his daughter's marriage, before the act of 1806, sent home property with her, it was presumed to be a gift as between the parties, and should be taken as such in favor of creditors. *Collier* v. *Poe*, 55

2. But a declaration to the daughter accompanying the delivery, that a loan and not a gift was intended, is sufficient to rebut the presumption, and convert the husband into the father's bailee, altho' such declaration was unknown to the husband. *Id.* 55

Vide *Voluntary Conveyances*, 2. 3. *Slaves*, 1, 2, 3.

GRANT.

1. Although a misdescription of land, as to the County in which it lies, would not vitiate in a deed between individuals, it seems that a similar mistake in a grant would avoid it even at Law; because the grant is founded upon an entry and survey, which are to be made by sworn officers in the very County mentioned. *Lunsford* v. *Boston*, 483

2. But if such misdescription in a grant does not avoid it, clearly an entry made in one County, when the land lies in another, is void. And a Court of Equity will not compel another person, who made an entry and obtained a grant of the same land, with notice of the former defective entry, to convey to the first enterer. *Id.* 483

3. Where the Plaintiff averred, that land entered by him was situate in one County, where he made his entry, and that the Defendant had, with notice of his entry, obtained a grant for the same land, upon an entry made in another County, *held*, that if the land did lie in the County where the Plaintiff's entry was made, his title was purely legal, and the remedy at Law complete. *Id.* 183

Vide *Notice*, 1, 2.

GUARDIAN AND WARD.

Vide *Interest*, 1, 2.

HEIRS.

Vide *Devise*, 2, *Legacies*, 5, 6, *Statute of Limitations*, 2, *Bastards*, 1.

HUSBAND AND WIFE

1. Where land was sold for partition under the act of 1812, and the share of the *feme covert* paid to the husband, a Court of Equity will decree her an indemnity against him. *Bryan* v. *Bryan*, 47

2. A *feme covert* being thus entitled, *held*, that she could, by her next friend, maintain an adversary suit against the administrator of an infant *propositus* and her husband, and that the fund was not liable for the debts of the latter, either to the administrator or the intestate. *Id.* 47

3. In this State, no settlement being made on the marriage, the wife has no equity against her husband, he being insolvent, for a provision out of her *choses* accruing during the coverture. *Id.* 47

4. Where land is sold for the purpose of partition, the share of a *feme covert* in the proceeds is considered as realty, and cannot be paid to her husband, except she directs it on a private examination. *In the matter of James Dozier's heirs*, 118

5. A married woman can be bound as to her land, there being no separate estate, only by her deed executed in the prescribed form, or the decree or judgment of a Court; and if her deed be informal it cannot be aided. *Green* v. *Branton*, 500

6. Where the husband, with the wife's privity and consent, sold her land, and she received and enjoyed the purchase money, upon her bill to be relieved against an obstacle to her, in asserting her right to the same land, her fraudulent conduct does not bar her—and an outstanding legal estate, which otherwise she had a right to have removed, will not be held up as a security for the purchase money.—*Id.* 500

7. A wife is in all cases barred by a judgment against her husband and herself, obtained during the coverture, unless obtained by a combination between

the other party and the husband, in fraud of the wife's rights; and if the husband, for his own convenience, declines to defend the suit, the wife cannot have the judgment reversed, simply because it was unjust.—*Id.* 500

8. As where the husband and wife were served with a *sci. fa.* to subject her land to her father's debt, and the husband, without collusion with the Plaintiff, or the administrator, declined defending her interest—*held*, that the wife was barred by the judgment.—*Id.* 500

9. Where a husband received with his wife a large personal estate in possession, during the coverture, and afterwards induced her to join him in a conveyance of her land to a third person, who re-conveyed it to the husband, and the conveyance and re-conveyance were only designed to vest the fee in the husband, *held*, upon a bill filed by the husband as administrator of his wife to recover chattels of which she was the *cestui que trust*, that the children of the wife by a former marriage had no equity to prevent his obtaining the legal title to those chattels. *Jasper* v. *Maxwell*, 357

Vide *Lien*, 2, *Agreement*, 1, 2, *Divorce*, 1, 2, *Trust*, 18, *Marriage Settlement*, 3, 5.

INCUMBRANCE.

Vide *Trust*, 4.

INFANTS.

Vide *Costs*, 1, *Partition*, 1, *Administrators and Executors*, 2, *Trust*, 1.

INJUNCTION.

1. Injunctions are not awarded by Courts of Equity for the infringement of doubtful rights, until they have been established at Law. But when the right is clear, and the injury irreparable, an injunction will be awarded, altho' the right has not been established at Law. *Att'y General* v. *Hunter*, 12

2. Where a bill charged that the Defendant's mill dam injured the health of the relators, an injunction was perpetuated, notwithstanding the Defendant had been indicted for the same nuisance, on which there had been a mistrial, and altho' the indictment was still pending. *Id.* 12

3. It is an error to say that an injunction is of course waived by an amendment. But an injunction is never propped by an amendment. *Barnes* v. *Dickinson*, 326

4. An injunction is not dissolved of course upon the coming in of the answer, in which the Plaintiff's whole case is denied. The statement of the Defendant must be at least credible.—Any evasion in not responding to the material charges in the bill, or an extreme improbability in the statement of the Defendant, will induce the Court to retain the injunction. *Moore* v. *Holton*, 429

Vide *Mortgage*, 7, *Bill of Interpleader*, 2.

INTENT.

Vide *Legacies*, 9, 10, *Residuary Clause*, 1, *Parol Evidence*, 1, *Marriage Settlement*, 1.

INTEREST.

1. Interest is not of course to be compounded in favor of a ward against the executors of his guardian, but simple interest only is to be computed from the death of the latter, unless compound interest was received. *Ryan* v. *Blount*, 382

2. Ordinarily a guardian is to be charged with compound interest; but he may be exempted from it by proving that, after suitable exertions, he was unable to realize it. *Id.* 382

3. A debtor is liable to pay interest, by virtue of his contract, whether he make it or not. An agent or trustee is liable, only because he made it, or might have made it, but for gross neglect. As where a collecting partner, in obedience to the confiscation acts, *bona fide* paid the share of his alien partner into the treasury, it was held, that whatever may be the effect of the treaty upon such payment of the principal debt, the collecting partner was not liable for interest thereon. *McNair* v. *Ragland*, 516

Vide *Administrators and Executors*, 8, 10, 11.

INTERLOCUTORY DECREE.

Vide *Rehearing*, 1.

JUDGMENTS AT LAW.

Vide *Jurisdiction*, 7, 8, *Gaming*, 2, *Mortgage*, 7, *Husband and Wife*, 7, 8.

JURISDICTION.

1. The jurisdiction of the County Courts as Courts of Equity, being confined to suits for distribution, they have no power to make any order in such suits, which is not necessary to a correct decision. *Kennon* v. *Branson*, 64

2. Therefore, in a petition for distribution, where the administrator and intestate had been copartners, and upon a reference of the partnership and administration accounts, a balance was reported against the estate—*held*, that this only formed a *defence* against the suit—and that a decree against the next of kin for such balance was erroneous. *Id.* 64

3. Whether a Court of general Equity jurisdiction could decree the Plaintiff to pay a balance against him? *Qu.* — *Id.* 64

4. For the recovery of legacies, filial portions and distributive shares, the County Courts are Courts of Equity, and have all the powers of such Courts. Upon proper cases, they may review or rehear their own decrees. But where a decree was made which disposed of the cause, it was held to be equivalent to an enrolment, and that they had no power, at a subsequent term, to rehear that cause.—*Simms* v. *Thompson*, 197

5. A review cannot be had for mistakes in a decree, which might have been rectified by proper attention. *Id.* 197

6. Where a party had an adequate legal remedy, and has brought an action and failed in it, he has no right to the aid of a Court of Equity. *Barnes* v. *Dickinson*, 273

7. A Court of Equity will not relieve against a judgment at Law, unless the Defendant was ignorant of the fact in question pending the suit, or it could not be received at Law, as a defence. *Pence* v. *Nailing*, 289

8. Courts of Equity do not allow appeals to them, merely to obtain a new trial. And where a party, on being sued at Law, attempted to establish a legal defence before the jury, and was unsuccessful, he cannot on the same facts obtain relief in Equity.—*Id.* 289

9. After a failure at Law, the party cast cannot come into a Court of Equity, merely because the verdict is unjust; unless the matters alleged in Equity do not constitute a defence at Law. *Alley* v. *Leibetter*, 449

10. Where a discovery in aid of a defence at Law is sought from the conscience of the Defendant, it ought to be obtained pending the suit at Law. *Id.* 449

11. Discovery and relief are never given after a trial at Law, where the matter averred was available at Law, unless the party seeking it avers and proves, that he was ignorant of the defence or evidence, at the time of the trial.—*Id.* 449

12. A Court of Equity will not, upon a dispute respecting the title to church property, decide a religious controversy between its members. *Organ Meeting House* v. *Seaford*, 454

13. Upon a bill filed in this State, to enforce a decree made in South Carolina, *held*, TAYLOR, Chief-Justice, *dissentiente*, that the Courts of this State have a right to examine into the merits of the decree as upon a bill of review. *Pickel* v. *Johns*, 123

14. Where a resident of South Carolina, upon separating from his wife, gave her a *post mortem* bond for her own benefit, and that of their children, and died in South Carolina, having voluntarily conveyed land in this State to illegitimate children, *held*, TAYLOR, Chief-Justice, dissenting, that a decree of the Chancery of South Carolina, declaring this conveyance to be void against the wife and children, was a nullity, the subject matter being without its jurisdiction. Whether the land conveyed to the children is liable to be taken in satisfaction of the bond? *Qu.* *Id.* 123

15. In such a case it seems that subsequent advancements, made by the father to the children provided for in the bond, are considered a satisfaction of it *pro tanto*; and it is clear, that land charged with the payment of his debts is to be exhausted, before a Court of Equity will subject property conveyed, or bequeathed to the illegitimate children. *Id.* 123

Vide *Review*, 1, *Creditors*, 8, 9, *Injunction*, 1, 2, *Grant*, 3.

LAPSE OF TIME.

1. Altho' lapse of time is no bar to an express trust, yet payment or other satisfaction may be presumed from it. *Ivy* v. *Rogers*, 58
2. Where an administrator, two years after his qualification, made a return to the County Court admitting a balance against him, a bill filed twenty years afterwards by the next of kin, for that balance, without accounting for the delay, is too late. *Id.* 58
3. It seems, that the return alters the relation between the administrator and the next of kin, and divests the former of his character of trustee. *Id.* 58
4. Any delay in suing, which can be satisfactorily accounted for by the course of public events, will not be construed into an abandonment or satisfaction of the Plaintiff's demand. *McNair* v. *Rayland*, 333

Vide *Pleading*, 1, *Answer*, 1, *Trust*, 1, *Administrators and Executors*, 6, *Possession*, 1.

LEGACIES.

1. A bequest of a negro of a particular description, with a direction to the executor to purchase one, rather than divide families, is a pecuniary legacy. *White* v. *Beattie*, 87
2. Altho' specific legacies do not abate in favor of those which are pecuniary, yet where the testatrix bequeathed *all* her property specifically, and directed two negroes to be purchased for A and B, *held*, upon a deficiency of assets, that all the legacies must abate ratably. *Id.* 87
3. A legacy which is equal to, or larger in value than a debt due by the testator to the legatee, is *prima facie* a satisfaction of the debt. *Ward* v. *Cofield*, 108
4. Where A devised all his North Carolina property to his son B, and all his Tennessee property to his son D, a resident of Tennessee, and charged all his debts due in North Carolina upon the devise to B, a debt due to D less than the legacy to him, was held to be satisfied by it. *Id.* 108
5. The word *heirs*, in a will, where the testator recognizes the existence of the ancestor, means *heirs apparent*. In a bequest to J. P. and the heirs of S. J. P. takes a moiety. *Jourdan* v. *Green*, 270
6. In such a bequest to heirs, if it be of a present interest, those only take who are born at the date of the will, and perhaps at the death of the testator. But if the interest is expectant upon a life estate, those take who are born before the expiration of the particular estate. *Id.* 270
7. A testator bequeathed a large estate in land and slaves to his son, and by a subsequent clause of his will, gave one of the same slaves to his daughter. *Held*, that the legatees took the slave by moieties. *Field* v. *Eaton*, 283
8. The son claimed the slave by a gift prior to the will; but as he had taken other property under the will, *held*, that he had made his election, and could not claim against it. *Id.* 283
9. There being no *latent* ambiguity, but plain contradictory bequests, *held*, that parol evidence was inadmissible to prove the testator's intention to give the property to his son. *Id* 283
10. Where there is no *latent* ambiguity, but plain contradictory bequests, parol evidence of the testator's intention is inadmissible. *Id.* 283
11. Specific legacies do not abate upon a deficiency of assets, unless all the property of the testator be specifically bequeathed. *White* v. *Beattie*, 320
12. But where the testator does not give away the whole of his property specifically, and what is left is afterwards consumed or destroyed by the testator or his executor, this circumstance will not make the specific legacies abate. *Id.* 320
13. It seems, that to determine whether a specific legacy shall abate or not, evidence of the state of the assets *dehors* the will may be received. *Id* 320

Vide *Administrators and Executors*, 2, 4, 5, 14, 17. *Devise*. *Trust*, 5, 6, 7, 12, 14.

LETTERS OF ADMINISTRATION,
Vide *Administrators and Executors*, 21.

LIABILITY.
Vide *Sureties*, 1, 2, 3.

LIEN.

1. The vendor has a lien for the purchase money upon the land sold, against volunteers and purchasers with notice. *Wynne* v. *Alston*, 163
2. It seems, that a creditor who takes a lien for an antecedent debt, is not entitled to the privileges of a purchaser. *Id.* 163

Vide *Dower*, 1, *Agreement*, 3, *Assignment*, 1, *Trust*, 23.

MARRIAGE SETTLEMENT.

1. Where a marriage settlement does not conform to the intention of the parties, either thro' mistake or the fraud of one of the parties, it will be corrected by a Court of Equity. *Scott* v. *Duncan*, 403
2. Where however the correction interferes with the rights of the husband or wife, or issue of the marriage, it will be made with more caution, than where it affects collaterals only, who are strangers to the consideration of the deed. *Id.* 403
3. A marriage settlement, which does not conform to the intention of the wife, will not be annulled, so as to leave the property subject to the legal rights of the husband; but it will be reformed by inserting the omitted provision, upon the same principles on which articles are executed. *Id.* 403
4. Collaterals, who claim under a settlement procured by the fraud of their father, are excluded from any benefit under it, upon its being reformed.—*Id.* 403
5. An agreement by parol, made before the act of 1819 (*Rev.* c. 1016) by a father, in consideration of the marriage of his illegitimate daughter, to settle all his estate upon her husband, herself and the issue of the marriage, is binding; and altho' it does not attach specifically upon any portion of the father's property, so as to defeat a purchaser with notice, yet it will be enforced against volunteers claiming under him. For tho' the relation between the father and the illegitimate daughter is not sufficient to raise a use, yet the intervention of the husband extends to the wife and the issue. *Wall* v. *Scales*, 472
6. In executing such an agreement, care will be taken of the interest of the issue—and the husband submitting, the estate was limited to him for life with a power to make advancements upon the marriage or full age of the children; with remainder to the issue as tenants in common, and cross remainders between them upon their death under age and unmarried. *Id.* 472

Vide *Contracts*, 1, *Agreement*, 1, 2.

MARSHALLING.

Vide *Creditors*, 10.

MILLS.

Vide *Injunction*, 1, 2.

MISDESCRIPTION.

Vide *Grant*, 1, 2, 3.

MISTAKE.

1. Equity relieves against mistakes, as well as against fraud in a deed or contract in writing; and parol evidence is admissible to prove the mistake, tho' it is denied in the answer; and this where the Plaintiff seeks relief affirmatively on the ground of mistake. *Newsom* v. *Bufferlow*, 379
2. As where the owner of two adjoining tracts of land, having sold one of them, in describing the metes and bounds in a deed executed to the purchaser, by mistake included both tracts. The proof of the mistake being perfectly satisfactory, the vendee was decreed to re-convey to the vendor the tract of land not intended to be conveyed. *Id.* 379

Vide *Award*, 1, *Marriage Settlement*, 1, 2, *Grant*, 1.

MERGER.

Vide *Partners*, 2.

MONEY CONSIDERED AS LAND.

Vide *Lien*, 1, 2, *Husband and Wife*, 1, 2, 4, *Devise*, 2, *Partition*, 1.

MORTGAGES.

1. A subsequent mortgagee, whose deed is duly registered, is bound by a prior unregistered one, of which he had notice. *Pike* v. *Armstead*, 110
2. If a mortgagee, for the purpose of keeping up the mortgagor's credit, suffers his deed to remain unregistered it seems not to be fraudulent *per se*, but its character depends upon the intent,

It is not fraudulent as to one who knows the whole transaction. *Id.* 110

3. Where the lands conveyed in mortgage were sold by the mortgagor in separate parcels, the first vendee has no equity to marshal the whole mortgage debt upon a second—the latter having no notice of the purchase of the first. *Stanly* v. *Stocks*, 314

4. If the second vendee had notice of the purchase of the first, would that fact alter the rule? *Qu. Id.* 314

5. But where the first vendee paid his purchase money in extinguishment of the mortgage, and the second did not, *held*, upon an adjustment of the loss between them, that the payment of the first was to be estimated in his favor. *Id.* 314

6. In Equity, upon a bill by the mortgagor to redeem, he shall have relief, tho' at Law the estate of the mortgagee is barred; as upon a disseisin and seven years possession with color of title. *Benzein* v. *Robenett*, 444

7. A judgment creditor is not affected by notice of a prior unregistered mortgage, and is in this respect, distinguished from the vendee of the mortgagor himself. Therefore the Court will not enjoin such creditor from selling the mortgaged premises, under his execution *Davidson* v. *Cowan*, 470

Vide *Creditors*, 1, *Bills of Exchange*, 2, *Trust*, 4, *Conditional Sales*, 1, 2, 3, *Practice*, 6.

NOTICE, PURCHASER WITH AND WITHOUT.

1. Where a grant is obtained, with knowledge of the fact that the land had been before granted, such grant is void, and will be vacated in Equity. Where this state of facts appears, the Court will act, altho' the party entitled to relief is made Defendant with the fraudulent grantee, especially where the bill was filed many years ago, when our Equity system was imperfect, and the practice little understood. *Benzein* v. *Lenoir*, 225

2. Where such fradulent grant has been recently obtained, the Court will entertain a bill to vacate, *quia timet*; *a fortiori*, where possession has been had under it, so as to bar or cloud the title at Law, and will not only vacate the grant, but direct a reconveyance. *Id.* 225

3. It is no defence that the fraud was not intended for the person upon whom it has taken effect; for if fraud exists, the party practising it shall not be protected against any who are thereby injured. *Id.* 225

Vide *Creditors*, 1, 2. *Mortgage*, 1, 2, 3, 4, 5. *Trust*, 8. *Practice*, 5, 7. *Grant*, 2, 3. *Partition*, 2, 3. *Marriage Settlement*, 5.

NUISANCE.

Vide *Injunction*, 1, 2.

PAROL EVIDENCE.

1. Parol evidence is inadmissible to prove, that the intention of the testator was not properly expressed in the will; or that he used words, the meaning of which he did not understand. *Reeves* v. *Reeves*, 386

Vide *Legacies*, 9, 10, 13. *Statute of Frauds*, 1. *Mistake*, 1, 2.

PARTIES TO A SUIT.

1. Where a Plaintiff seeks to enforce an equity against Law, he can have no relief unless the person who has the legal title be a party to the suit. *Jones* v. *Jeffreys*, 492

2. A bill brought by some of the persons entitled under the residuary clause in a will, without making the others Defendants, or accounting for the omission, cannot be supported.—*Huson* v. *McKenzie*, 463
Arendell v. *Blackwell*, 354

Vide *Wills*, 2. *Administrators*, 19. *Statute of Limitations*, 4.

PARTITION.

1. Where land was sold for partition under the act of 1812, the share of a minor not being vested according to the act, a Court of Equity will follow the property, and decree it to an heir against an administrator. *Bryan* v. *Bryan*, 47

2. In a partition under the act of 1787, a charge of money upon the more valuable dividends, for equality of partition, is a *legal* charge upon the *land*, and follows it in the hands of a purchaser for valuable consideration without notice. *Wynne* v. *Tunstall*, 25

3. Money thus charged is realty as much as the land for which it is the substitute; and where it was allotted to the share of a *feme covert*, and the husband had taken a bond and given a receipt for it, held, that the husband and wife could recover the amount for her use *Id.* 23

Vide *Lien*, 1. *Husband and Wife*, 1, 4.

PARTNERS.

1. A deed to a copartnership vests the property in the firm, not in the individual members. Each takes an entirety, and by his own deed, can only convey his right to the residue after a settlement of the partnership accounts. *Donaldson* v. *Bank of Cape Fear*, 103

2. Where upon a contract by copartners, made in Virginia, the bond of one was taken to secure the partnership debt, *held*, that if by the law of that State, the contract be joint, the execution of the bond extinguished the debt; if joint and several, that it was no merger of the simple contract debt against the other partners; and as the creditor had a plain remedy against them at Law, a Court of Equity could not aid him further than by a discovery; and this, altho' he averred that the bond was executed in the copartnership name by one copartner, in ignorance on his part, that it did not bind the copartnership. *Spear* v. *Gillet* 466

Vide *Jurisdiction*. 3. *Creditors*, 3. *Depreciated Currency*, 4. *Confiscation*, 2. *Statute of Limitations*, 5, 6. *Interest*, 3.

PAYMENT.

Vide *Legacies*, 3, 4 *Trust*, 1. *Agreement*, 3. *Depreciated Currency*, 1, 2, 3, 4. *Lapse of Time*, 4.

PENALTY.

Vide *Covenant*, 2. *Usury*, 1, 2, 3, 4.

PLEAS.

Vide *Practice*, 9.

PLEADING.

1. A bill should contain only a statement of facts on which the Plaintiff's case is founded, not the evidence of those facts; therefore where lapse of time forms no bar to the claim, but only raises a presumption of fact inconsistent with it, the lapse need not be accounted for in the bill. *Nesbit* v. *Brown*, 30

Vide *Answer*, 1, 2, 3. *Bill of Interpleader*, 1.

POSSESSION.

1. Where the Plaintiff charged that the Defendant held slaves as his trustee, and prayed an account of the profits, and that the possession might be surrendered to him, and the Defendant denied the trust, and insisted that he had held possession twenty six years adversely to the right of the Plaintiff, and there was no proof of the trust—*held*, even if the Court had jurisdiction for a discovery or an account, that as the possession of the Defendant was a bar to an action at Law—by analogy it was a bar to the relief. *Mordre* v. *Leigh*. 360

Vide *Gift*, 1, *Widows*, 1.

POSSESSION WITH COLOR OF TITLE.

Vide *Mortgages*, 6.

PRACTICE.

1. Exceptions to a report, upon a reference to take an account, are unnecessary when the Master assigns unsatisfactory reasons for his conclusions.—*Hooks* v. *Sellers*, 61

2. It seems, that a bill to correct errors in an account, is in its nature, an exception, and to a report on such a bill stating a new account, none need be filed. *Id.* 61

3. Where a replication is taken to an answer, the answer is not evidence, unless responsive to the bill. Therefore, where the Plaintiff charged one assignment, and the Defendant denied that and set up another, and no proofs were taken—*held*, that the case was to be considered without reference to either. *Johnson* v. *Person*, 364

4. A reference to the Master to take an account need not be renewed at every term between the order and the report. *Id.* 364

5. If a party to a bill for an account re-

side out of the State, and has no known agent to attend to the suit, it is proper to serve notice of taking the account upon his Counsel in this Court. *Id.* 364

6. Upon a bill to foreclose or redeem a mortgage, its existence being admitted, a reference for an account of the amount due upon it is an order of course. Questions respecting that amount properly belong to the account, and are only heard upon exceptions to the report. *Blackledge* v. *Nelson*, 411

7. On the hearing of an original bill, in the nature of a supplemental bill, and bill of revivor, depositions taken in the original suit may be read. *Benzein* v. *Robenett*, 444

8. A reference is never made to establish a fact put in issue by the pleadings; but always relates to some matter supplemental to the relief granted at the hearing. *Lunsford* v. *Boston*, 488

9. In Equity an admission in the plea may be used by the Plaintiff against the Defendant. *McNair* v. *Ragland*, 533

10. A cause which has been prematurely removed to this Court, must be remanded at the costs of the party removing it. *Taylor* v. *Dickens*, 71

11. No decree can be made against one on whom process has not been served, unless he has entered an appearance. *Ryan* v. *Blount*, 382

12. A guardian shall not be permitted to prosecute a suit against his ward. *Smith* v. *Dudley*, 354

Vide *Bill of Interpleader*, 1, 2. *Notice* 1. *Injunction*, 4. *Sci fa.* 1. *Administrators*, 18, 21. *Rehearing*, 1. *Answer*, 1, 2, 3. *Costs.*

PRIORITY.

Vide *Mortgage*, 1. *Creditors*, 4. *Notice*, 1, 2.

PUFFERS.

Vide *Auction sales*, 1.

PURCHASERS.

Vide *Creditors*, 1, 3. *Lien*, 1, 2, 3, 4. *Mortgage*, 3, 4, 5. *Administrators*, 5, 12, 13, 17. *Dower*, 1.

REFERENCE TO THE MASTER.

Vide *Practice*, 4, 6, 8.

REGISTRATION.

Vide *Mortgages*, 1, 2, 7. *Trust*, 8. *Voluntary Conveyances*, 4.

REHEARING.

1. A petition for a rehearing is the proper remedy against an interlocutory decree. *Ricks* v. *Williams*, 3

Vide *Jurisdiction*, 4.

RELEASE.

Vide *Administrators*, 7.

RELIGIOUS SOCIETIES.

Vide *Jurisdiction*, 12.

REMAINDER.

Vide *Administrators*, 4.

RELIEF.

1. Where a contract is declared to be void, the parties are remitted to their original rights; and where a Court of Equity aids in restoring them to those rights, it confines itself to restitution merely, and never decrees damages for a loss. *Ellis* v. *Ellis*, 398

2. Upon a parol contract for the sale of land, the bond of a third person was assigned, in payment of the purchase money, to the vendor, at the instance of the vendee, by one who was not a party to the contract, the obligor in which was insolvent at the time of the assignment. Upon a decree declaring the contract to be void, as the vendee could at Law recover neither the bond nor the money, the Court lent its aid; but proceeding on the principle of restitution merely, they ordered a judgment upon the bond in favor of the vendor, to be assigned to the vendee. *Id.* 398

Vide *Sci. Fa.* 1. *Creditors*, 8. *Bills of Exchange*, 1. *Jurisdiction*, 7, 8.

REMOVAL.

Vide *Costs*, 2.

REPAYMENT.

Vide *Specific Performance*, 1, 2.

RESIDUARY CLAUSE.

1. Every testator is presumed not to die intestate as to any part of his estate. Therefore a residuary clause, unless expressly restrained, always

passes whatever is not otherwise disposed of. *Reeves* v. *Reeves*, 385

RESTITUTION.

Vide *Relief*, 1, 2.

RESULTING TRUST.

Vide *Trust*.

REVIEW.

1. Whether a bill to review a decree of this Court can be filed in the Court below? *Qu. Barnes* v. *Dickinson*, 326
2. A bill of review for newly discovered testimony cannot be sustained, if the discovery was made in time to have been brought forward in either an amended or supplemental bill. *Id.* 326

Vide *Jurisdiction*, 4, 5.

ROADS.

1. Where the Legislature authorized one to open a road and collect tolls on it, a subsequent authority for a similar purpose to another is valid, altho' it may diminish the profits of the first road. *Allen* v. *Buncombe T. Co.* 119

SALE.

Vide *Fraud*, 6.

SATISFACTION.

Vide *Legacies*, 3, 4. *Trust*, 1.

SCIRE FACIAS.

1. Where a decree was made for the payment of money against an administrator, and it was ascertained by the decree that he had no assets—*held*, HENDERSON, Chief-Justice, *dissentiente*, that a *sci fa.* under the act of 1784 (*Rev. c.* 226) is confined to judgments at Law; and that the only remedy for the Plaintiff was by a bill against the heirs, to have satisfaction out of the real assets. *Jeffreys* v. *Yarborough*, 506

SET-OFF.

1. Where the Plaintiff and Defendant have mutual judgments in different Courts, and the Defendant is insolvent, a set-off will be allowed in Equity. *Iredell* v. *Langston*, 392

Vide *Trust*, 14.

SLAVES.

1. The second *proviso* of the third section of the act of 1806 (*Rev.* 701) respecting parol gifts of slaves, applies to the whole act, and is prospective in its operation. *Stallings* v. *Stallings*, 298
2. By that *proviso*, parol gifts of slaves to children are validated by the death and intestacy of the parent, without resuming the possession, and become effectual, from the time the slaves were delivered to the children. *Id.* 298
3. Where slaves were delivered to a child, and remained in his possession until the death of the parent intestate, it was held to be an advancement at *the time of delivery*, and the subsequent increase was not to be valued in making distribution of the parent's property, nor to be taken as an advancement to the child. *Id.* 298
4. Slaves can only be held as property; and conveyances, having for their object either their emancipation or a qualified state of slavery, are against public policy, and a trust results to the donor or his executor. *Stevens* v. *Ely*, 493
5. As where slaves were conveyed in trust to permit them to live together, and be industriously employed, and that the donee should exercise a control over their morals and furnish them with necessaries—*held*, that upon the face of the deed (HALL, Judge, *dissentiente*,) as the slaves were not considered the property of the donee, a trust resulted to the executor of the donor, and a conveyance of the legal title was directed to be made to him. *Id.* 493

Vide *Gift*, 1. *Administrators*, 4, 14.

SPECIFIC PERFORMANCE.

1. A bill in the alternative, either for a specific performance of a parol contract, or a repayment of the purchase money, is not sustained by Courts of Equity, because if the contract be avoided, the money may be recovered at Law. *Ellis* v. *Ellis*, 398
2. But upon a bill for a specific performance, which has been refused, where from peculiar circumstances, the Plaintiff cannot at Law, recover back his purchase money, its repayment is decreed. *Id.* 398

Vide *Statute of Frauds*, 1, 2. *Contracts*, 1.

STATUTES COMMENTED UPON.

1715, c. 2, Benzein v. Lenoir, 223
Benzein v. Robenett, 464
c. 7, Pike v. Armstead, 110
c. 10, Bailey v. Shannonhouse, 416
Cooke v. Streator, 374
Collier v. Poe, 55
1784, c. 226, Jeffreys v. Yarbrough, 506
1787, c. 274, Wynne v. Tunstall, 23
1788, c. 284, Dunn v. Holloway, 322
1799, c. 522, Kimbrough v. Davis, 71
Flintham v. Holder, 345
1806, c. 701, Stallings v. Stallings, 298
1812, c. 830, Harrison v. Battle, 537
c. 847, Bryan v. Bryan, 47
Dozier's Heirs, 118
1814, c. 869, Collier v. Collier, 353
1818, c. 962, Lee v. Norcom, 372
1819, c. 1016, Wall v. Scales, 472
Ellis v. Ellis, 180, 341
1820, c. 1037, Smith v. Washington, 318

STATUTE OF FRAUDS.

1. Where the Plaintiff seeks specific performance of an agreement for the sale of lands, and the Defendant denies the contract as alleged, and relies upon the statute, (1819, *Rev.* c. 1016) parol evidence cannot be received, even upon the ground of part performance, to show the contract. *Ellis* v. *Ellis*, 341
2. Whether if the contract so partly performed were admitted by the answer, the execution of it could be decreed since the statute? *Qu. Id.* 341
3. The act of 1819 (*Rev.* c. 1016) respecting parol contracts for the sale of lands and slaves, and the statute of frauds, (29 *Charles*, c. 3) were made to effect the same object, and should receive the same construction. *Ellis* v. *Ellis*, 180
4. And where the whole purchase money was paid and possession delivered according to the contract, altho' no note in writing was made of it, a specific execution was decreed. *Id.* 180

STATUTE OF LIMITATIONS.

1. The statute of limitations does not apply as between bailor and bailee, and the latter cannot, by denying the bailment and claiming against the bailor, make his possession adverse.—*Collier* v. *Poe*, 55
2. Where letters of administration upon the estate of a deceased debtor never have issued, and after more than seven years from the death of the intestate, assets come to his heirs—it was held, upon a bill filed by a creditor setting forth these facts, and praying to have his debt paid out of the assets lately come to the possession of the heirs, that the act of 1715 (*Rev.* c. 10) was a bar to the debt. *Cook* v. *Streator*, 324
2. To a bill against the executors of an executor, by the legatees of the first testator, a plea of the act of 1715 (*Rev.* c. 2) barring claims against dead men's estates unless made within seven years, is not available, without an averment that the residue of the estate had been paid to the Trustees of the University. *Bailey* v. *Shannonhouse*, 416
4. It seems, that if a Defendant in Equity intends to rely upon the statute of limitations, it must be pleaded. *McNair* v. *Ragland*, 533
5. Whether accounts between copartners are in any case barred by the statute of limitations? *Qu. Id.* 533
6. But where there is an agreement between copartners, under seal, to account, a bill for an account is not barred, before an action on the covenant would be. *Id.* 533

Vide *Bill of Interpleader*, 2. *Mortgage*, 6.

SUBSTITUTION.

Vide *Creditors*, 4. *Bills of Exchange*, 2. *Mortgage*, 3, 4, 5. *Sureties*, 4. *Trust*, 2, 3.

SUPPLEMENTAL BILL.

Vide *Sci. Fa.* 1.

SURETIES.

1. The order in which parties to a security are liable at Law, is the order in which, independently of contract, they will be held bound in Equity.—*Smith* v. *Smith*, 178
2. In Equity, however, by a contract, the indorser may be made accountable to the maker, and the acceptor to the drawer. *Id.* 173
3. Where A, as surety, signed the note of B, payable to C, and it was indorsed by C at the request of and for the accommodation of B, there being no contract between A and C, whereby they agreed to become co-sureties of B, *held*, that A had no right to contribution from C. *Id.* 178
4. Where the administrator and one of the sureties to the administration bond;

were next of kin to the intestate, and upon a suit on the bond by an administrator *de bonis non*, a stranger, also a surety, was alone subjected, *held* that he had a right in Equity to retain the share of the principal to indemnify him in full, and that of his co-surety to equalise the loss. And that having satisfied the Judgment, he had, in Equity, a right to recover back the shares of his principal and co-surety. *Norfleet* v. *Cotton*, 334

Vide *Creditors*, 1, 3, 5, 6, 7. *Bills of Exchange*, 2.

TAXES.

Vide *Widows*, 1.

TENANCY IN COMMON.

Vide *Executors and Administrators*, 2.—*Legacies*, 7. *Partners*, 1.

TREATIES.

Vide *Confiscation Acts*, 1, 2.

TRUST.

1. Satisfaction of an open trust is not presumed from lapse of time; but a settlement between the trustee and *cestui que trust* changes the character of the trust, and subjects it to the presumption of satisfaction. Therefore where a settlement was made between an administrator and an infant distributee nearly of age, and not afterwards disaffirmed by the infant, it was held, that the lapse of twenty-two years raised the presumption of satisfaction. *Petty* v. *Harman*, 191

2. *Dictum*, per Henderson, Chief-Justice, the case of *Falls* v. *Torrance* was decided upon the ground, that the trust was an open one and never had been closed. *Id.* 191

3. A trust being an incident of the legal estate in the land, is of necessity destroyed by whatever destroys or suspends the legal estate. Therefore the lord by escheat, the abator, intender, disseisor, &c. are not subject to a trust. *Benzein* v. *Lenoir*, 225

4. An equity of redemption is not a trust, but is a right inherent in the land, and charges all who take the land, altho' coming in in the post and by title paramount. *Id.* 225

5. The doctrine of execution *cy pres* does not prevail in this State, and if the intention of a testator cannot be literally fulfilled, a trust results for the heir or next of kin. *McAuley* v. *Wilson*, 276

6. Where a testator bequeathed property in trust, for the support of a minister of the Associate Seceding party, "who shall preach at the Seceding Congregation meeting house, called Gilead," and a majority of that congregation being of a different denomination, refused to permit a minister of the Associate Seceding party to officiate in their church; it was held, that a trust resulted, altho' the Associate Seceding party offered to build a church near the one mentioned by the testator. *Id.* 276

7. Where a testator directed his land to be sold, and the proceeds applied to a purpose which failed, *held*, there being no evidence of an intent to convert the land out and out into money, that a trust resulted to the heir at law, notwithstanding a residuary clause, bequeathing "any other thing not mentioned in this my last will." *Henderson* v. *Wilson*, 309

8. A conveyance of a *chose* in action, in trust to pay a debt, is within the act of 1820, (Rev. c. 1037) and unless registered within six months of its date, is void against a subsequent *bona fide* assignee without notice. *Smith* v. *Washington*, 318

9. When no rule for the management of a trust estate is prescribed by the creator of it, the law enjoins good faith; by which is meant honesty and diligence carefully applied—and a departure from the rule prescribed by the creator, or a failure in good faith, is a breach of trust for which the trustee is liable. *Hester* v. *Hester*, 328

10. Where a testator directed his debts to be collected, and a tract of land to be sold; and with the fund thus created, a residence for his family to be purchased—but the executors purchased to an amount exceeding the fund, and in the exercise of good faith, refused an advantageous offer for the land—*held*, that they had been guilty of a breach of trust only in exceeding the amount of the trust fund, and the purchase being divisible, they were decreed to hold the excess on their own account. *Id.* 328

11. Equity always compels the trustee to surrender the legal estate to the *cestui que trust*, unless the receipt of the profits by the trustee is necessary

to effectuate the intention of the creator of the trust. *Jasper* v. *Maxwell* 357

12. Where a testator bequeathed bank stock to his executor, in trust, to pay the dividends to his daughter for life; and upon the expiration of the charter of the bank, gave the same shares absolutely to his daughter without any limitation over—*held*, that the daughter took the stock absolutely, and that her administrator had a right to call for a transfer of it. *Id.* 357

13. Where a husband received with his wife a large personal estate in possession during the coverture, and induced her to join him in the conveyance of her land to a third person, who reconveyed it to the husband, and the conveyance and reconveyance were designed only to vest the fee in the husband—*held*, upon a bill filed by the husband as administrator of the wife, to recover chattels of which she was the *cestui que trust*, that the children of the wife by a former marriage had no equity to prevent his obtaining the legal title of those chattels.—*Id.* 357

14. S. C. by his will gave legacies to the children of J. C. The children died intestate, leaving their father the next of kin. The executor of S. C. having obtained a decree against J. C. for a mortgage debt, died, and appointed the Plaintiffs his executors.—J. C. died also insolvent, leaving the debt unpaid; and the Defendant having administered on the estates of the children of J. C. upon a petition in the County Court, obtained a decree for their legacies against the Plaintiffs, who, thereupon brought their bill to set off the decree in favor of their testator against that for the legacies, alleging that there were no debts due from the estates of the children of J. C. and that his estate was beneficially entitled to the whole of the legacies. *Held*, that the Plaintiffs were entitled to the relief sought, which was nothing more than subjecting the funds of an insolvent *cestui que trust*, in the hands of his trustee, to the payment of his debts. *Iredell* v. *Langston*, 392

15. A fraudulent trustee, who pending a litigation between him and his *cestui que trust*, purchase the trust estate at a Sheriff's sale, acquires thereby no title, and the Sheriff's deed to him can stand only as a security for the amount of his bid. *Keaton* v *Cobb*, 439

16. Where the *cestui que trust* incurs costs at Law in defending a title purely equitable, against his trustee, and does not at once come into the proper forum for redress, he cannot in Equity recover his own costs at Law; but he is entitled to a repayment of the amount of costs paid to the trustee.—*Id.* 439

17. *Dictum, per* HENDERSON, Chief-Justice.—Where the legal estate passes, trusts annexed to it, which are either illegal or impolitic, are avoided, and a trust declared for the donor, or the donee declared to hold, discharged of any trust, as will best tend to suppress the illegal purpose. *Stevens* v. *Ely*, 493

18. *Dictum, per* HENDERSON, Chief-Justice.—In a will, estates are created by the intent of the devisor, however expressed; but to the creation of the same estate by deed, certain technical words are necessary. But when the estates are created, whether by deed or will, they possess similar qualities; and the same circumstances will in one case cause a trust to result to the heir, and in the other to the grantor. *Id.* 493

19. Under the first section of the act of 1811 (*Rev.* c. 830) subjecting trust estates to execution, only such estates as are held in trust for the Defendant in the execution solely, are within the operation of the act. As the Sheriff's deed transfers the estate of both the trustee and *cestui que trust*, those cases where it is necessary, for the purposes of the trust, that the trustee should retain the legal estate, are not within its operation. As in case of a conveyance to sell and pay debts, and then in trust for the bargainor, the estate of the trustee is not destroyed by an execution sale of the interest of the *cestui que trust*. *Harrison* v. *Battle*, 537

20. But the interest of the bargainor, after payment of the debts, being in no respect distinguishable from an equity of redemption, may be sold under the second section of the act. *Id.* 537

21. That section subjects equities of redemption in *law* only to execution sales. The same interest in chattels is left as at common law, and can be subjected to the satisfaction of an exe-

cution, only in a Court of Equity.—*Id.* 537

22. Where lands and slaves were conveyed, in trust to pay debts, with a resulting trust in favor of the bargainor, and after its execution the bargainor made further assignments of the resulting trust, to secure debts, and judgments were also recovered against him—*held*, that execution bound the resulting trust in the land from the *teste*; and if they overreached the assignments, had a priority; and that as to the resulting trust in the slaves, it was bound in Equity in favor of the creditor who first filed his bill, without reference to the *teste* of his execution; and that assignments made before the filing of the bill had a preference. *Id.* 538

23. Creditors secured by the deed upon land and slaves, are in favor of the execution creditors, having a lien upon a resulting trust in the land, marshalled so as to have their debts satisfied, *pro tanto*, by a sale of the slaves.—*Id.* 538

Vide *Fraud*, 2, 3. *Lapse of Time*, 1, 3. *Possession*, 1. *Agreement*, 4, 5. *Slaves*, 4, 5. *Interest*, 3.

TRUSTEE.

Vide *Trust*.

TRUSTEES OF THE UNIVERSITY.

Vide *Statute of Limitations*, 3.

USURY.

1. Wherever the debtor, by the terms of the contract, can avoid the payment of a larger by the payment of a smaller sum at an earlier day, the contract is not usurious. *Moore* v. *Bolton*, 429

2. In such case, the larger sum becomes a penalty, against which Equity will relieve. *Id.* 429

3. Where the holder of a bond for the payment of a certain sum promises to surrender the bond, upon the payment of a less sum at an earlier day, to take advantage of such promise, there must be a strict compliance on the part of the obligor. *Id.* 429

4. To constitute usury the obligation to pay more than legal interest must be absolute upon its face. *Id.* 429

VENDOR AND VENDEE.

Vide *Fraud*, 1, 2. *Lien*, 1. *Mortgage*, 3, 4, 5. *Trust*, 6.

VOLUNTARY CONVEYANCES.

1. Defective voluntary conveyances are not aided by a Court of Equity; but rights vested under them are protected. *Dawson* v. *Dawson*, 93

2. Where a tenant in common of slaves voluntarily conveyed all of a particular kind, which might fall to his share upon a division, and then fraudulently contrived that none of that kind should be allotted to him—a division, made with this fraudulent intent, was held to be inconsistent with the rights which the deed vested in the donees. *Id.* 93

3. Volunteers, who claim under a deed of gift, executed under the impulse of feeling, rather than the convictions of the understanding, in which apparently the grantor did not exercise perfect free will, are not aided in a Court of Equity. *Dawson* v. *Alston*, 396

4. If a voluntary deed, fairly obtained, is destroyed by the donor before registration, a Court of Equity will compel him to convey the same property to the donee. *Tolar* v. *Tolar*, 456

Vide *Lien*, 3.

VOLUNTEERS.

Vide *Marriage Settlement*, 4. *Voluntary Conveyances*, 3.

WILLS.

1. A Plaintiff who claims under a will, which is not admitted in the answer, must produce it, or a copy of it at the hearing, or account for its loss. *Thompson* v. *Applewhite*, 460

2. One who claims under a will which is not established, must have all the persons interested to contest it before the Court. *Id.* 460

Vide *Legacies*, 5, 6, 7, 8, 9, 10. *Parol Evidence*, 1. *Residuary Clause*, 1.

WIDOWS.

1. A widow, who after the death of her husband, occupies his residence, his children, some of them of age, living with her, is under no obligation to pay the taxes accruing thereon, between his death and the assignment of her dower. *Dawson* v. *Fairly*, 77

2. Therefore a purchase by her of the premises, for such taxes, made after the assignment of dower, without actual fraud, will not be set aside in favor of her husband's creditors. *Id.* 77

Vide *Agreement*, 2.